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SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

THOMAS J. KLITGAARD
225 Bush Street
San Francisco, California 94104
Attorney for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction and Background Proceedings	2
Constitutional Provisions Involved	3
Questions Presented	3
Statement of the Case	4
A. The Attempted Robbery and Two Robberies	5
1. Attempted Robbery (Liquor Store at 12th and Peralta)	5
2. Robbery (Liquor Store at 17th and Peralta)	7
3. Robbery (Liquor Store at 16th and Linden)	9
B. The Arrest	11
C. The Identification Procedures	13
1. Liquor Store at 16th and Linden	13
2. The Line-Up	14
3. The Preliminary Hearing	20
4. The Use of Photographs	23
The Trial	26
A. Evidence Adduced	29
1. State's Case	29
(a) Preliminary Exhibits and Testimony	29
(b) The Attempted Robbery and the Two Robberies	31
(c) Closing Testimony and Exhibits	38
2. Defendant's Case	42
B. Arguments to the Jury	45
1. Opening Argument	45

Page

2. Defendant's Argument 48

3. The Closing Argument 51

C. Instructions to the Jury 55

1. Admissions by Silence 55

2. Failure to Testify 56

The Appeal 57

ARGUMENT:

Summary and Introduction 59

A. It was error to rule that comment and instruction on petitioner's failure to testify were harmless beyond a reasonable doubt 61

B. It was error to use petitioner's silence in the face of accusations by a police officer at the arrest, and later by a viewer at the line-up, as "adoptive admissions" of guilt 71

C. The line-up and other identification procedures used by the police and district attorney, outside court, were unduly suggestive. Separately and collectively they denied petitioner a fair trial .. 78

1. The Show-Up 79

2. The Line-Up 82

3. The Photographs of Petitioner 90

D. Petitioner was denied the right to counsel at trial, when the court required him to go to trial without counsel, after he refused to accept further representation by the public defender's office. Petitioner was also denied counsel on appeal, when the appellate court refused to appoint counsel to brief or argue petitioner's case on the two remands 96

Page

1. At Trial 97

2. On Appeal 106

Conclusion 108

Table of Authorities

CASES:

Anders v. *California*, 386 U.S. 738 (1967) 108
Avery v. *Alabama*, 308 U.S. 444 (1940) 104

Banks v. *California*, 382 U.S. 420 (1966) 2
Banks v. *California*, 387 U.S. 92 (1967) 2
Boyd v. *United States*, 116 U.S. 616 (1886) 77
Bram v. *United States*, 168 U.S. 532 (1897) 77
Brubaker v. *Dickson*, 310 F.2d 30 (9 Cir. 1962), certiorari denied 372 U.S. 978 (1963) 104

Chapman v. *California*, 386 U.S. 18 (1967) 2, 58, 59, 62, 69, 73, 74, 77, 107

Douglas v. *California*, 372 U.S. 353 (1963) 96, 108

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 74

Fontaine v. *California*, 390 U.S. 593 (1968) 63, 69

Gideon v. *Wainwright*, 372 U.S. 335 (1963) ..70, 96, 104, 106
Gilbert v. *California*, 388 U.S. 263 (1967) 81, 82, 88, 90, 95
Griffin v. *California*, 380 U.S. 609 (1965) 2, 7, 57, 59, 60, 61, 62, 70, 72, 73, 74, 75, 76, 107

Haynes v. *Washington*, 373 U.S. 503 (1963) 70, 77
Helton v. *United States*, 221 F.2d 338 (5 Cir. 1955) 75

Jackson v. *Denno*, 378 U.S. 368 (1964) 77

Lynumn v. *Illinois*, 372 U.S. 528 (1963) 70, 77

Page

MacKenna v. *Ellis*, 280 F.2d 592 (5 Cir. 1960), opinion modified (as to procedure on remand) 289 F.2d 928 (1961), certiorari denied 368 U.S. 877 (1961) 105
Malloy v. *Hogan*, 378 U.S. 1 (1964) 74, 78
McCarthy v. *United States*, 25 F.2d 298 (6 Cir. 1928) 75, 77
Miller v. *Pate*, 386 U.S. 1 (1967) 94
Miranda v. *Arizona*, 384 U.S. 436 (1966) 60, 75
Mosley v. *Dutton*, 367 F.2d 913 (5 Cir. 1966), certiorari denied 387 U.S. 942 (1967) 105

O'Connor v. *Ohio*, 385 U.S. 92 (1966) 62

People v. *Cockrell*, 63 Cal.2d 659 (1965), certiorari denied 389 U.S. 1006 (1967) 72, 73, 75
People v. *Gould*, 54 Cal.2d 621 (1960) 79, 82
People v. *Ridley*, 63 Cal.2d 671 (1965) 72, 73

Rideau v. *Louisiana*, 373 U.S. 723 (1963) 70

Simmons v. *United States*, 390 U.S. 377 (1968) 92
Stovall v. *Denno*, 388 U.S. 293 (1967) 61, 79, 80, 81, 82, 87, 90, 92, 95

Townsend v. *Bomar*, 351 F.2d 499 (6 Cir. 1965) 105
Tumey v. *Ohio*, 273 U.S. 510 (1927) 70
Turner v. *Louisiana*, 379 U.S. 466 (1965) 70

United States v. *Pearson*, 344 F.2d 430 (6 Cir. 1965) 75
United States v. *Wade*, 388 U.S. 218 (1967) 61, 82, 85, 88, 89, 90, 92, 94, 95

CODE:

United States Code, Title 28:
Section 1257(3) 3

Page

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

Fifth Amendment 3, 70, 72, 74
Sixth Amendment 3, 95, 96, 105
Fourteenth Amendment 3, 74, 96

PUBLICATIONS:

Borchard, Convicting the Innocent (1932) 80, 81
Frankfurter, The Case of Sacco and Vanzetti (1927) 68, 79
Wall, Eye-Witness Identification in Criminal Cases (1965) 68, 79, 81, 85, 94, 95, 96

Developments in the Law—Confessions, 79 Harv.L.Rev. 938 (1966) 77

Identification Parades, Part I Crim.L.Rev. 479 (1963) 85, 87

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BRIEF FOR PETITIONER

Opinions Below

The California District Court of Appeal, to which this Court has issued its writ of certiorari, has rendered three opinions in this case. All were certified for nonpublication. The most recent was filed October 2, 1967 (A. 341); the two earlier opinions were filed May 20, 1966 (A. 332), and September 16, 1964 (A. 317).*

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* Abbreviations used herein are "A." for Appendix, "Tr." for trial transcript, "P.X." for respondent's trial exhibits, and "D.X." for petitioner's trial exhibits.

The California Supreme Court denied petitioner a hearing, without opinion. Its order denying review was dated November 10, 1964; it is not reported in the official reports.

Jurisdiction and Background Proceedings

In an opinion filed September 16, 1964, the District Court of Appeal affirmed petitioner's conviction by a jury on charges of attempted robbery and robbery (A. 317). The California Supreme Court denied further review. On January 24, 1966, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari, vacated the judgment of affirmance, and remanded the case to the District Court of Appeal "for further proceedings in light of *Griffin* v. *California,* 380 U.S. 609" (*Banks* v. *California* (1966) 382 U.S. 420).

On remand, the District Court of Appeal reaffirmed the conviction. In an opinion filed May 20, 1966, it acknowledged that comment and instructions on petitioner's failure to testify were error, as contrary to the rule of *Griffin;* but adopting its prior opinion in full, the court went on to hold that "[i]n view of the abundant evidence of appellant's guilt, * * * it is not reasonably probable that a result more favorable to Banks would have been reached in the absence of the error" (A. 333-334). On May 15, 1967, this Court once more granted petitioner's motion to proceed *in forma pauperis* and his petition for a writ of certiorari to the District Court of Appeal, vacated the judgment reaffirming his conviction, and remanded the case to the Court of Appeal "for further consideration in light of *Chapman* v. *California,* 386 U.S. 18" (*Banks* v. *California* (1967) 387 U.S. 92).

On the second remand, the District Court of Appeal again affirmed petitioner's conviction. In an opinion filed October 2, 1967, it (1) approved and incorporated by reference its original opinion filed in 1964 (A. 341), and (2) without further discussion declared a belief, "based upon the conclusive evidence of his guilt," that comment and instruction on petitioner's failure to testify were "harmless beyond a reasonable doubt" (A. 342). Once again petitioner sought a writ of certiorari to the District Court of Appeal. By order dated December 26, 1967, the time for filing the petition was extended by Justice William O. Douglas to February 29, 1968. The petition was filed February 20, 1968, and was granted October 21, 1968, together with petitioner's motion for leave to proceed *in forma pauperis*. Jurisdiction rests on section 1257(3), Title 28, United States Code.

Constitutional Provisions Involved

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether comment by the prosecutor and instructions by the trial court on petitioner's failure to testify were harmless beyond a reasonable doubt.

2. Whether use of "adoptive admissions" against petitioner as evidence of guilt, and also comment and instruction on such admissions, deprived petitioner of his privi-

lege against self incrimination and of his right to a fair trial.

3. Whether the line-up and other identification procedures used by the police and district attorney denied petitioner a fair trial, in violation of his right to due process of law.

4. Whether there was a denial of counsel at trial, when the court required petitioner to go to trial without counsel, after he refused to accept further representation by the public defender's office; and whether there was a denial of counsel on appeal, when the District Court of Appeal refused to appoint counsel to brief or argue petitioner's case on the two remands.

Statement of the Case

Petitioner Fred Banks, a 48-year old Negro, was convicted by a jury in the Alameda County Superior Court on August 7, 1962, on two counts of robbery and one count of attempted robbery. He was given concurrent sentences on all three counts and is presently serving an indeterminate term at Folsom Prison.

Count one charged petitioner with attempted robbery of a liquor store at 12th and Peralta in West Oakland. Count two charged him with robbery of a liquor store at 17th and Peralta, and count three with robbery of a liquor store at 16th and Linden, approximately ten city blocks away.

The principal issue in the case was one of identification, i.e., whether petitioner was in fact the robber.

A. The Attempted Robbery and Two Robberies

The evidence showed that the attempted robbery and the two robberies all took place on May 4, 1962, within a span of 20 to 30 minutes, and between 11:00 and 11:30 at night. An aggregate of $235-$265 was taken; $70-$100 from one liquor store, $165 from another. The sequence of events was as follows:

1. *Attempted Robbery (Liquor Store at 12th and Peralta)*

At approximately 11:00 P.M., a Negro wearing a hat and sportcoat entered the liquor store and walked to the sales counter, where there were two cash registers (A. 55-56; P.X. 19, A. 55). Harry Jow, an employee of the store, stood behind one cash register; his boss and part owner of the store, Roger Wong, behind the other (A. 54-56). The sales counter was on one side of the store, along a wall to the right of the entrance (P.X. 19, A. 55). Jow was at the rear cash register (A. 56). About five or six customers were in the store (A. 54, 74).

The robber came up to Jow and demanded "all your money" (A. 109). He had his right hand in his coat pocket indicating a gun, and rested the pocket on the counter, between Jow and Wong (A. 55, 57, 109). Jow talked with the robber while attempting to attract the attention of Wong, who was busy with a customer (A. 55-56, 109). Wong overheard the robber repeat the demand for money (A. 56). He took a "peek," and then reached under the counter, grabbed a .38 revolver, and brought it down on the robber's

pocket (A. 57). He did not hit anything hard like metal (A. 75). He told the robber to "[p]ut your hands up," but the robber refused (A. 57). Instead, he cursed Wong, and then walked out of the store and ran away (A. 57). Wong did not shoot, because of the customers (A. 57).

This was the first time in his life Wong had seen the person who attempted the robbery (A. 65). It was also the first time his store had been robbed (A. 77, 95). He was "plenty excited" (A. 82, 86, 95, 104). "Things happen so fast," he said, "you just take a quick look" (A. 83).

Jow too was "a little excited" (A. 110, 112, 117). When it appeared the robber had no gun, he had urged Wong to "[s]hoot him" (A. 57). Like Wong, he had not seen the robber before (A. 112).

The police arrived six or seven minutes after the robber left (A. 112). In the interval, Wong and Jow discussed his identification (A. 81-82, 96). Jow had seen the robber better than Wong because he had faced him more (A. 94). When the police arrived, the investigating officer did not question Wong or Jow separately; instead, he questioned both about the identity of the robber at the same time, in the presence of each other (A. 81-82, 112). Neither made an independent identification, and neither could later remember with certainty what portions of an identification he gave the officer (A. 81-82, 87, 94, 112-114). "I answered a little bit," Wong said, "he answered a little bit. We piece it together" (A. 82).

The officer's report listed the robber as a male Negro, 50 years old, 5′6″ tall, 150-160 pounds, medium build, dark complexion, with dark trousers, a yellow plaid shirt, and

dark sport jacket (P.X. 9 for identification, A. 37). It did not refer to any scars, mustache, or other distinguishing characteristics.

2. *Robbery (Liquor Store at 17th and Peralta)*

At approximately 11:15 P.M., a Negro wearing a hat and sport coat walked into a liquor store some five and one-half blocks away from the attempted robbery and directed the clerk to "[h]and over the money" (A. 126, 129).[1] The clerk, Robert Perry, thought he was kidding, and turned to wait on another customer, who also had just walked in (A. 127, 164). But the robber repeated his demand: "If you don't want to jeopardize your life, hand over the money," he said, "And I'm not kidding" (A. 127). Perry then saw that the robber had his right hand in his coat pocket and was waving the pocket back and forth, simulating a gun (A. 127). Perry walked to the till, opened it, and handed over part of the money (A. 127). "That isn't all. Give me all of the money," the robber said (A. 127). Perry complied (A. 128). The robber then backed out of the store, and ran away (A. 130, 162).

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[1] The prosecutor introduced in evidence a specially prepared diagram that showed the streets and general vicinity in West Oakland where the various offenses took place, and also the location of the store some distance away where the petitioner was arrested (P.X. 28, A. 43, 49, 249). While this case was still pending in the Court of Appeal, on the initial remand for further consideration in light of *Griffin* v. *California* (1965), 380 U.S. 609, the district attorney's office removed the diagram and all other trial exhibits from the files of the Superior Court (Alameda County Superior Court files, Action No. 33698, item #40 (exhibit record)). The district attorney's office then destroyed a number of these exhibits, including the diagram. Because of this, references to distances herein are based upon a standard "Alameda County Popular Street Atlas" (1968), prepared by Thomas Bros. Maps.

In the meantime, the other customer, George Griffith, had run out of the store as soon as he heard the robber say "I'm not kidding" (A. 127-128, 162). On the way out, he met Robert Jones, another customer who was just entering (A. 164-165, 178). Griffith said, "That man is holding up the liquor store", but Jones thought he said, "They are closing up," and rushed inside (A. 165; see also A. 153, 178). Jones almost knocked the robber down trying to get in (A. 153, 178). The robber, in turn, had backed right into Jones, as he was running out the door (A. 153). Griffith, on the outside, followed the robber for 10 or 15 steps, until he turned a corner (A. 165). Perry then called the police (A. 133, 165).

When the police arrived, Griffith told the investigating officer that the robber was wearing a gray striped coat, a grayish hat, and a yellowish-looking shirt (A. 165-166). He also said that the robber had a scar on the left side of his face, and located it variously on the cheek; right down on the jaw; and by the lip, by the corner of the nose (A. 166). He did not know whether the robber had a mustache, or hair on his lower lip (A. 175), or whether the robber's shirt had a flower on it (A. 175).

Perry also described the robber to the investigating officer (A. 133). Apparently Griffith was present (A. 166). Perry said the robber was a Negro, that he was wearing a sport-coat, and that he had a scar on the left side of his face (A. 136-137). He did not pay any attention to the shirt (A. 129, 137), or to whether the robber had a tie (A. 129, 137). Nor, as he told the officer, was he "directly sure" of the color of the robber's hat (A. 133). In the nearly 12 years Perry had worked at the liquor store, this was the first time he had been robbed (A. 141, 143).

Jones did not describe the robber to the officer (A. 183). The only information he gave was that the robber "backed up in my arms," with the money in one hand and the other hand in the pocket (A. 183). He did not see a beard on the robber, or a goatee on his lower lip (A. 180-181). Jones had not yet been drinking, but "was just fixing to start" (A. 189).

The investigating officer's report listed the robber as a male Negro, 45 years old, 5'9" tall, 180 pounds, husky build, dark brown complexion, with a brown hat, dark grey sport coat, and dark trousers (P.X. 11 for identification, A. 37). The sole "identifying characteristic" listed was a "small scar left side of mouth." There was no reference to a mustache or goatee. Under "trademarks (peculiar actions)" was the single word, "nervous."

The robber took between $70 and $100 (A. 147-148, 262).

3. *Robbery (Liquor Store at 16th and Linden)*

At approximately 11:30 P.M., a Negro wearing a hat and sport coat or sport jacket entered a liquor store about 10 blocks away from the above-described robbery, and 22 blocks away from the attempted robbery (A. 190-191, 194, 203). He came up to the counter (A. 191). The owner of the store, William Pauletich, did not notice him "too much," because he had two other customers (A. 191). Then, when he got to the counter, Pauletich saw that he had his hand in his pocket and was "pointing it toward me, like he had a gun in there" (A. 191). The man, according to Pauletich, was "very calm" (A. 191). "He didn't—wasn't threatening or anything, demanding money quickly, or anything like

that, but he kind of hesitated for a little while, both of us" (A. 191).

When the robber pointed to the cash register, Pauletich's mother got up from a chair about six feet away and asked what the man wanted (A. 192). Pauletich thought the robber said, "I want the money" (A. 192). In any event, Pauletich said, "he wants the money out of the register" (A. 192). So his mother handed over the money, all in currency (A. 192). Pauletich, meanwhile, was taking a few steps one way, and a few another way, behind the counter (A. 192, 201). The robber, still calm, told Pauletich to "[g]o ahead and press the button and notify the cops, if you want" (A. 201). He then took the money and ran out the door, "going quite rapidly" down the street, back towards Peralta (A. 192-193). Pauletich did not know whether the robber put the money in his pocket, or kept it in his hand (A. 204).

A passerby, Sam Slaise, saw a man come out of the liquor store around 11:30 P.M. and go down the street, walking fast (A. 220-222, 225). The man had money in one hand, his left, and his other hand in a coat pocket (A. 223). Slaise saw him for a block and a half or so, and saw him get into a car (A. 224). He could not identify the car or the man, because it was dark (A. 225). Nor could he tell what kind of clothes the man was wearing (A. 225). He could not recognize the man if he saw him again (A. 225).[2]

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[2] Petitioner's objections to Slaise's testimony, on the ground he did not identify the man who came out of the store as petitioner, were overruled (Tr. 471, 472, 477). "[W]hether he has proven anything or not is for the jury to determine," the court said (A. 225). Later it denied a motion to strike this testimony (A. 237).

As soon as the robber left, Pauletich called the police (A. 195). Officers arrived 5 or 10 minutes later (A. 210). Pauletich told them that the robber was a colored person, about 5'8" tall and 150 pounds (A. 195), or "about my size" (A. 195), and that he was wearing a sportcoat and hat (A. 195). He did not give a description of the robber's trousers (A. 195), nor did he notice whether the robber had a mustache (A. 197, 209), nor was he too sure about a scar (A. 195). He did not know for sure if the robber had any hair on his lower lip (A. 197). He did not remember how old he said the robber was (A. 197).

There was no evidence that Pauletich's mother gave the police a description of the robber. Nor, apparently, did Slaise.

The investigating officer's report listed the robber as a male negro, 40-50 years old, 5'9" to 5'10" tall, 170 pounds, medium build, medium dark complexion, with a "spt. coat brn & grey check hat?" (P.X. 13 for identification, A. 38). No mention was made of a mustache, chin whiskers, or scar (*ibid.*). Nor were any "identifying characteristics" or "trademarks" noted.

The loss was set at approximately $175-$200 (*ibid.*). Later it was reduced to $165 (A. 198).

B. The Arrest

Shortly before midnight the same evening, petitioner was arrested while standing in a liquor store at 21st and Market Streets in West Oakland (A. 226-228, 238-239). This was about eight blocks northeast of the last liquor store robbed at 16th and Linden, and in a different direction from the westerly path taken by the robber when he

ran out of the store. It was about 18 blocks from the first robbery and about 21 blocks from the attempted robbery.

Petitioner had been in the Market Street store for somewhere in the neighborhood of five minutes before his arrest (A. 230, 234). He had made no attempt to rob the store (A. 230), nor was he subsequently charged with any criminal conduct there (A. 1-3).

He had been talking with the clerk on duty (A. 229-231, 234). Apparently the clerk told him about a woman employee who had been killed at the store a while before (A. 234). Petitioner asked the clerk if he had a gun, and when questioned "Why do you ask that," said to the clerk, "Well, I might want to hold you up" (A. 228, 231). About this time, some police officers walked in (A. 228). The clerk told them that he did not like what petitioner had said (A. 228). Petitioner, in the interval, had ordered a half pint of Old Taylor and was standing in front of the counter (A. 228).

One officer told the clerk that some places had been held up, and said to petitioner, "Buddy, you fit the description,"[3] and began to search him (A. 228). He took some crumpled money out of the breast pocket of petitioner's shirt, and put it in his own pocket (A. 239). He did not find a gun (A. 232, 239, 244). The evidence did not show how much money the officer found (A. 232, 239-241), but later, at police headquarters, he continued the search and took "some more money out of his [petitioner's] other

[3] When the police officer made the accusation, "Buddy, you fit the description," petitioner remained silent. The prosecutor later stated to the jury that petitioner's silence under these circumstances was an "adoptive admission" of guilt, and instructions of like nature were given by the Court (see pp. 71-78, below).

pocket and his wallet" (A. 239). The total for both searches was $176 (A. 240).

When the officer asked petitioner where he got the money, after searching him at the store, petitioner said that he was working and that he had earned his money (A. 231, 233, 247-248). He said that he lived in Pittsburg, a town about 30 miles from Oakland (A. 248). He told the officer that if he called to Pittsburg, he could verify the statement as to the money (A. 248). The officer, however, did not investigate along that line (A. 248). Disregarding petitioner's further statement that he had not robbed anyone (A. 248), the officer placed him in the patrol car with another officer, and drove off (A. 240, 247).

C. The Identification Procedures

1. *Liquor Store at 16th and Linden*

Instead of taking petitioner directly to police headquarters, the arresting officer drove him to the liquor store at 16th and Linden, the scene of the second robbery (A. 240). A sergeant and patrolman were already there (A. 245). The arresting officer left petitioner in the car and went inside the store, where he talked with the two officers (A. 245). He then turned petitioner over to the sergeant (A. 245). Petitioner was taken from the car and brought into the store (A. 245-247). An officer was on either side of him; one had him by one hand, another by the other hand (A. 199).

Pauletich, the owner of the store, saw petitioner and the two officers coming in (A. 199). He did not tell these officers that the store had been robbed; he presumed they knew it and understood what had happened (A. 199, 209-

210). He was standing behind the counter, and moved to one end so that he could see better (A. 199). When the officers asked if this was the man, Pauletich said, "Yes, that is him" (A. 200). At one point, not entirely clear from the record, he moved around from the counter to get closer to the officers and petitioner (A. 200). The whole procedure took "just a matter of a moment or so" (A. 200).

Like the robber, petitioner was wearing a sportcoat and hat (A. 194, 201). He was also the only Negro in the group—Pauletich and the two officers being Caucasian (A. 201; P.X. 7 for identification, A. 36). Pauletich was not sure whether there was anyone else in the store at the time with a hat and sportcoat (A. 219). "There was a little excitement going on," he said (A. 219).

Petitioner had been brought to the store about 30 minutes after the robbery occurred (A. 193, 199). He stayed "a very short time" (A. 201). He was then put back into the police car and transported to the Inspector's Division at the Oakland Police Department (A. 240, 246). He was not arraigned or taken before a magistrate (A. 62), but was further searched for money by the arresting officer (A. 240-241), and held for a line-up the following morning.

2. *The Line-Up*

The next morning, May 5th, petitioner was exhibited in a line-up to Wong, Jow, Perry, Griffith and Jones (A. 169, 182). Pauletich, who had seen petitioner the night before, was not present. Jow and Wong were witnesses to the attempted robery at 12th and Peralta (pp. 5-7, above); Perry, Griffith, and Jones were witnesses to the later, actual robbery at 17th and Peralta (pp. 7-9, above).

On the morning of the 5th, the police had called Wong and told him they had a suspect, and to come down and see if he could pick him out (A. 67-68, 92). An inspector had made a somewhat similar call to Perry (A. 153-154, 158-159). Perry did not want to go, because he had work to do; but he was asked to see if he could identify the suspect, and that was the only reason he was there (A. 158-159).

All five, Wong, Jow, Perry, Griffith, and Jones, met at police headquarters (A. 168-169). An officer gathered them together and from there walked them over in a group to the jail at city hall, about two blocks away (A. 168-169). It was not clear whether they discussed the identity of the robber (A. 150-152). At city hall, they took an elevator to the jail (A. 151, 169). There was some talk in the elevator (A. 151-152), and Perry, in the presence of at least some of the others, said that if he "saw the guy again in the next hundred years, I would be able to identify him, because I got a good look at him" (A. 151-152). Perry was "hot," because had lost a day's pay (A. 152). He was also worried about how long the identification would take, since he did not want to get a parking ticket (A. 153).

At the jail, Wong, Jow, Perry, Griffith and Jones were all herded into a small room (A. 68). There was a door at the other end of the room and a small window that looked out into a narrow corridor (A. 169; D.X. B, A. 106). The inspector who had called Perry was present in the room and conducted the line-up (A. 153).

Lined up in the corridor, under numbers painted on the wall, were petitioner and four other Negroes (A. 170; D.X. B, A. 106). Petitioner, at 48, was noticeably older than the

rest, who were mainly "young guys" (A. 101-102, 171; D.X. B). He was also dressed differently (A. 171; D.X. B). He stood in the middle of the line-up, at the number 3 position (A. 69, 140; D.X. B). On his immediate left was a man dressed entirely in light colored clothes, with a light shirt, light trousers, and light colored windbreaker jacket (D.X. B). Further to the left was another man in a windbreaker jacket; he also had on light colored trousers and shirt (*ibid.*). To his right were two youths in dark trousers (*ibid.*). The closest had on a loose sport shirt covered with large polka dots; the other, a light shirt with rolled-up sleeves, and a suit vest (*ibid.*). Petitioner, standing in the middle, was the only one dressed like the robber, with both a sport coat and hat (D.X. B; A. 171). He had on dark trousers and a yellow shirt (D.X. B; A. 70).

Perry went to the window first (A. 135). Like the rest, he had been told "to look straight through the glass and see if [he] could see the suspect" (A. 116, 139). He had also been told, "No talking" (A. 139). The inspector asked Perry if he saw the man who held him up, and Perry said, "Yes, I saw the suspect. I saw the one that robbed me" (A. 157-158). All this took place in the presence of the others, who were waiting their turn to look through the window (A. 89, 169, 171).

Griffith apparently was next (A. 169-170). Petitioner was standing bareheaded (A. 170). The inspector asked Griffith if he could identify anyone in the line-up (A. 171), and after petitioner put his hat on, Griffith said, "Yes, that is the man right there with the hat on" (A. 170-171). He did not see anyone else wearing a hat (A. 171), nor did he pay any attention to whether anybody else in the

line-up had a scar on his face (A. 172). He looked at nobody but petitioner (A. 172). "Ain't nobody else have their coat on," he said, "because them other guys was young guys" (A. 171).

Wong was third or fourth to the glass (A. 89-90). The inspector told him to "[p]ick the person out" (A. 89)—to "pick out the right one and be pretty sure" (A. 94). Wong then looked for the man he was supposed to pick (A. 70-71, 92-93, 103-104).[4] He identified petitioner by his face and clothing (A. 69). At first, all he saw was the sport coat and yellow shirt (A. 70). And although he testified he could identify petitioner at that point, he "wanted to make sure" (A. 60, 70). So he had petitioner put on his hat (A. 60, 70), and then made an identification (A. 59-60, 69-70).

Wong did not remember whether anyone else in the line-up wore a sport coat (A. 70-71), nor did he pay much attention to how many of the others had hats (A. 70).[5] He did not remember how many appeared over 50

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[4] Wong, of course, knew the police had a suspect whom they believed had committed the attempted robbery (A. 67-68, 92). On the telephone, they told him about the line-up and that he was "to pick out one, to see if it is the right one, and make sure it is the right one * * * " (A. 92).

At the line-up, the police told Wong, "There are quite a few people in there, a different bunch we can bring in," and that if he couldn't "pick out one in the same line up, to pick the next bunch" (A. 92). The police, however, did not show him any line-up other than the one with petitioner (A. 92-93).

[5] On direct examination, Wong testified that everyone in the line-up put on a hat (A. 60). Later, on cross examination, he was less certain (A. 70-72, 73). He admitted he told the court at the preliminary hearing that some had hats, but others did not (A. 71-72).

years old (A. 93, 101), or had mustaches or beards (A. 93). But he said that none had a scar (A. 93).[6]

Jow looked through the glass, but could not make a positive identification (A. 116, 121, 125). His view was blocked (A. 125), and the glare on the glass affected his vision (A. 116, 121). He told the inspector that the third person resembled the robber (A. 116). This person was wearing a hat, sport jacket, and yellow shirt (A. 116). At one point, he told the inspector that such person looked "exactly like the fellow that came and robbed the store" (A. 117). But despite this statement, Jow was still not too sure (A. 121, 125), and told the inspector so (A. 116, 123, 125).

Jones saw petitioner without his hat on, but dressed in a sport coat and dark trousers like those worn by the robber (A. 182-183, 186). Then the police said, "Put your hat on," and Jones said, "Well, that's the man" (A. 183). Jones did not recall talking directly to the inspector when he made the identification (A. 185). "[W]e was all talking together," he said (A. 185). He did remember telling someone at the line-up that petitioner looked like the robber (A. 186). But this man was not dressed in police clothes, and Jones did not know his name or what he was (A. 186).[7]

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[6] Wong contradicted himself several times in explaining why he could remember some things about the line-up, but not others. As to how many persons wore sport coats, he said, "I studied faces" (A. 93, 100). Later he said, "I studied them [the persons in the line-up] one by one" (A. 101); but as to how many had beards and mustaches, he said, "I am supposed to pick the right one, I am not supposed to study everyone of them" (A. 93).

[7] Jones said that he saw other suspects put on hats (A. 186). The court, however, cut off petitioner when he began to cross examine Jones on how many hats he had actually seen (A. 186).

Sometime during the course of the line-up the inspector asked that anyone who could positively identify the man go outside, into the line-up corridor, and point him out (A. 121, 131). Perry, the first viewer, said that he could (A. 131). Together he and the inspector went into the corridor, through the door from the line-up room (A. 121, 131-132). The evidence shows that Perry came face to face with petitioner, pointed directly at him, and said, in substance, "[T]hat was the man who held me up" (A. 132). Petitioner did not deny the accusation, but remained silent and said nothing (A. 132). The record does not disclose whether anyone back in the small room heard the accusation.[8] But Griffith said that he saw "two guys" go up and put their hands on petitioner, while he was looking through the glass window (A. 169), and Jow at least was aware that at some point the door had been opened and "two of the boys" had gone out to the line-up to identify the robber (A. 121). But he did not know which one was identified, because he was in the back of the room (A. 121).[9]

After the line-up was over, the inspector or someone else permitted Wong to examine the back of petitioner's hand, where Wong claimed to have struck the robber with

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[8] The prosecutor argued to the jury that petitioner's silence in the face of Perry's accusation at the line-up was an "adoptive admission" of guilt (A. 298-299), and the trial court so instructed the jury (A. 305) (see the discussion at pp. 71-78, below).

[9] It is not entirely clear when, in fact, Perry went into the line-up corridor, to confront petitioner with his accusation. At trial, however, the prosecutor asked Perry about a confrontation in terms of one occurring after Perry had already identified petitioner in the line-up (A. 131). Griffith's testimony would indicate this confrontation occurred almost immediately after Perry went to the window (A. 169-170).

his .38 (A. 59, 74-75; see also pp. 5-6, above). All Wong saw was a black spot (A. 60). He could not, or would not, say whether the hand was swollen (A. 73-74).

The inspector's line-up notes listed Jow as "not too sure"; Griffith as picking number 3 (petitioner) to look like the man, but "not too positive"; and Jones as positive, "[a]fter he saw him with hat on" (P.X. 3 for identification, A. 35).

3. *The Preliminary Hearing*

On May 16th, there was a preliminary hearing on all three counts, after which petitioner was held for trial. The prosecutor did not call Jow, Griffith or Jones, but only Wong, Perry and Pauletich.

The line-up played an important role at the preliminary hearing. Wong, the first identification witness, was cross examined at length about what he saw, in an attempt to separate the line-up from his independent recollection of the appearance of the person who had been in his store (Tr., Preliminary Hearing, pp. 12-19, 28-30). Wong said that he could not remember who went to the window first, but denied hearing what the viewers before him had said (Tr., Preliminary Hearing, p. 18). He admitted that he had talked about the facial characteristics of the person with Jow, on their way down to the line-up (Tr., Preliminary Hearing, p. 30). He also admitted that he was not sure that the hat worn by petitioner in the line-up was the same hat he saw at the time of the attempted robbery (Tr., Preliminary Hearing, pp. 15-16). Nor was he too sure about what he saw on the back of petitioner's hand, after the line-up. "Well, look like he got a dark spot over

here," he said, "but I don't know if I do it or not" (Tr., Preliminary Hearing, p. 19).[10]

Perry, the second identification witness, acknowledged that he had committed himself to an identification of petitioner, at the line-up (Tr., Preliminary Hearing, pp. 38-45). He admitted that before he saw petitioner in the line-up, he had been asked by the police "to come down to see if I could identify the suspect" (Tr., Preliminary Hearing, p. 39). He said that he could not tell the court what the other men in the line-up looked like, because "I didn't pay any attention to them" (Tr., Preliminary Hearing, p. 44).

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[10] Immediately before Wong's denial that he heard any of the first persons to the window identify petitioner, the trial court plainly recognized the prejudice to which Wong had been exposed:

"Mr. Shaughnessy [assistant public defender]:

Q. Now, Mr. Wong, who was it that looked through the window at the people in the line up first?

* * * * *

"Mr. Whyte [deputy district attorney]: I object to this as irrelevant. The man stated he saw the line up and made the identification when he looked. Who looked first, I believe, is irrelevant.

"Mr. Shaughnessy: Your Honor, if I may be heard on this, *the district attorney has been through enough preliminaries where identification is the problem to know that the description of the people looking at suspects, and what is said, is crucial to the validity of the identification.* It is hard to believe that the objection is made in seriousness.

"Mr. Whyte: The objection is made in the utmost of seriousness.

"The Court: He identified the defendant in court. *I assume what you want to find out is whether somebody said, 'Oh, it is number 3', sitting next to him, or something like that.*

"Mr. Shaughnessy: *Precisely.*

"The Court: Overruled" (emphasis added) (Tr., Preliminary Hearing, p. 17).

Pauletich, the third identification witness, admitted on cross examination that he had seen petitioner between the time of the robbery and the in-court identification, when petitioner had been brought into his store between two police officers, who were holding him by the hands (Tr., Preliminary Hearing, pp. 52-53). He recited that the officers had asked if this was the man, and that he had said, "Yes" (Tr., Preliminary Hearing, p. 53). He was not certain whether the police had also shown petitioner to his mother, who had been sitting in the vicinity of the cash register at the time of the robbery and who had handed the money over (Tr., Preliminary Hearing, pp. 47-48, 53).

Conflicts between the preliminary hearing testimony of the prosecution witnesses, and their later testimony at trial, were brought to the frequent attention of the jury, in refreshing the recollections of these witnesses and on impeachment (e.g., Wong: A. 70-73, 75-77, 78, 79-80, 87-89, 90, 98-99; Perry: A. 146, 147-148, 150, 158-159; Pauletich: A. 202-203, 204, 217-218). It was pointed out, for example, that at the preliminary hearing Perry admitted being asked down to the police station to identify "the suspect," a term he did not first remember at trial, but later conceded was used (A. 158-159); that Pauletich had originally described the robber as wearing a "sport coat, jacket sport coat, and a hat," but later only a suit-type sport coat and hat (A. 202-203, 210-211; Tr., Preliminary Hearing, p. 49);[11] and that Wong had placed a "little scar" on the

[11] There was no satisfactory resolution of the conflicts in Pauletich's testimony as to what the robber wore—whether a sport coat and a sport jacket, or only a coat, or only a jacket (A. 202-204, 210-211); and at one point, Pauletich claimed he may have said the clothing was a "sport coat" *or* "sport jacket" (A. 203). As the trial court observed, the question had been asked "about six times, and we haven't got the same answer twice" (A. 211).

right side of the robber's face in the preliminary hearing, but changed this to the left side at trial (A. 75-77).

4. *The Use of Photographs*

As already noted, three of the persons who saw petitioner in the line-up were not called to testify at the preliminary hearing (p. 20, above). They were Jow, Griffith, and Jones. These were the three least positive in their identification of petitioner, according to the inspector's line-up notes (P.X. 3 for identification, A. 35).

In July, shortly before trial and about two and one-half months after the line-up, a police officer brought a photograph of petitioner to Jow, either at his home or the store where he worked (A. 117-118, 122). It was delivered along with a subpena to appear for the trial (A. 122).

The photograph was in black and white (D.X. A, A. 91). It was made up in two parts—one, a profile view of the right side of petitioner's face and shoulders; the other, a straight-on, frontal view of his face and upper chest (*ibid.*). In both, petitioner was shown in a light sport shirt and dark sport coat, with the collar turned up in back (*ibid.*). In neither did he wear a hat (*ibid.*). Across petitioner's chest in the frontal view was a placard with the number "148235," the words "Oakland Calif.," and the date "5 May 1962" (*ibid.*). On the back of the photograph was a complete description of petitioner, giving his name, birthdate, height, weight, complexion, and color of hair and eyes (*ibid.*).

The officer who delivered the photograph asked Jow if the person shown was "the fellow that came and robbed

[i.e., attempted to rob] the store" (A. 117). Jow looked at the photograph (A. 117). It refreshed his memory of petitioner (A. 118, 122) and made him sure he was looking at the robber (A. 126).[12]

Jow said that he mentioned the photograph to his boss, Wong, but did not tell him anything about it (A. 122). According to Jow, only his mother was present when the officer showed him the photograph (A. 122).

Griffith too was shown a photograph of petitioner (A. 172-173). This occurred at the district attorney's office, about two to three weeks before trial (A. 173-174).[13] In viewing the photograph, Griffith just looked at petitioner's face, without paying attention to his clothes (A. 173). He did not notice any scars (A. 173). But he said he knew "it was [petitioner] when he showed me the picture" (A. 174).

Griffith denied that the picture refreshed his memory of the robber or the robbery (A. 174); on the other hand, he admitted that it had refreshed his memory of the defendant (A. 174). His testimony attempted to illustrate the distinction:

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[12] Jow contradicted himself several times concerning the influence of the photograph. At one point, he denied that the photograph had helped to refresh his memory, or that his memory needed to be refreshed (A. 124). He also denied that the photograph helped him to make up his mind in identifying petitioner (A. 120-121). But elsewhere, he admitted that after looking at the photograph, he was "pretty positively sure [that petitioner] is the one" (A. 120-121, see also A. 126), and conceded that he had not been too sure of an identification at the line-up (A. 121, 125).

[13] Griffith could not remember the exact date he went to the district attorney's office (A. 172-173). He was supposed to have been there on July 16th, but someone had called him and cancelled the appointment (A. 174).

> "I know it was you when they showed me the picture, *but I didn't think of no robber or nothing when he showed me the picture.* When he showed me the picture, I said, 'Yes, that's the guy that did the robbery' " (emphasis added) (A. 174).

Jones also was shown a photograph of petitioner (A. 181). He said that he had to leave work and come to the courthouse building about a week and a half to two weeks before trial (A. 181, 186). There he discussed the identification of petitioner with someone whose name he could not recall, but whom he guessed was a district attorney (A. 188). He discussed the type of hat and coat worn by defendant, and also whether defendant had a mustache (A. 188).[14] When shown the photograph, he recognized petitioner as the same person he had seen in the line-up (A. 186). But he denied that the photograph had refreshed his memory of this person (A. 186-187). "I just knew it," he said (A. 187). He then interjected, in a non-responsive answer to one of petitioner's questions, that he had seen the person in the picture at the place that was robbed (A. 187).

When asked whether he would have been able to pick out the defendant in the courtroom without the aid of the photograph, Jones refused to make a direct reply: "There was no one in here that looks just like him but him," he said (A. 187). Then, when the court intervened and de-

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[14] At trial, Jones testified that the robber had a "little mustache" (Tr. 408). The "mug" shots taken May 5th showed petitioner with a mustache (D.X. A). They also showed a clipped, goatee-like set of whiskers under petitioner's lower lip (*ibid.*); as to this, Jones testified that he did not see either a goatee on the lower lip of the robber or a beard (A. 180-181).

manded an answer, he said that he could (A. 187). Later he admitted that the only identification he could give the district attorney was that the defendant "looks like" the robber (A. 189). Jones, of course, acknowledged that he had told the district attorney how the robbery had occurred (A. 188).

Of the three witnesses who did testify at the preliminary hearing, Wong was the most certain that he had not been shown a photograph of petitioner prior to trial (A. 94). Perry at first thought he had seen a photograph, but eventually said he did not remember (A. 135-136). Pauletich too said that he did not remember a photograph (A. 204-205). Later he said that he remembered discussing the case with a police inspector who had come to his store, but did not think the inspector had shown him a picture of the defendant at that time (A. 209).[15]

The Trial

The trial began July 30, 1962 (A. 26). It lasted approximately seven court days (Clerk's Transcript on Appeal, pp. 15-32). Over five days were occupied by the presentation of evidence (*ibid.*). The State called eleven persons to testify; the defendant, five (*ibid.*). There was extensive cross examination of the persons called by the State (*ibid.*). The defense rested on the facts developed through cross examination, the direct testimony of defendant's witnesses, and the presumption of innocence (A. 27-28). Defendant himself did not testify (see pp. 44-45, below).

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[15] It is not clear from the record whether Jones, Griffith and Jow all saw the same photograph(s) of petitioner. Jow saw the "mug" shots (D.X. A, A. 91; see p. 23, above). The only other photograph of petitioner produced at trial was one showing him in the line-up (D.X. B, A. 106).

Three charges were at issue: attempted robbery of Wong (count one); robbery of Perry (count two); and robbery of Pauletich (count three) (A. 29-30). Further charges, that petitioner had been convicted in Illinois, in 1936, for robbery, armed robbery and murder and had served a subsequent prison term at Joliet, had been admitted at arraignment (Tr. 5) but were not before the jury (A. 29-30).[16]

The questions for the jury were whether defendant, beyond a reasonable doubt, had committed each of the three offenses charged. In short, whether the defendant was the robber—and not someone else—in each instance (A. 26-27, 268).

Motions for separate trials on each of the three counts were denied (Tr. 5-8, 10-12, 13-14; Clerk's Transcript on Appeal, pp. 4, 5, 7). So were requests by defendant, starting several weeks before trial, for an opportunity to talk to an expert on the mental factors that influence identification-making decisions (A. 26-27, 235-236; Clerk's Transcript on Appeal, pp. 10, 29). Requests during trial to subpoena one such expert (Dr. Kirk of the University of California at Berkeley) to testify on the causes of mistaken identification were also denied (A. 212-216, 235-236).[17]

The defense was conducted without counsel, by the defendant, in *pro per*. An assistant public defender sat inside

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[16] Petitioner had been in California since 1960, on parole, after serving about 22 years on the Illinois convictions (Tr. 42-43). When arrested on the present charges, he was working in Pittsburg, California, as a plumber (Tr. 42).

[17] Petitioner was not able to contact witnesses on his own, since he had been kept in jail from the time of his arrest and throughout the trial (Tr. 26, 532, 539, 638). The record suggests he did not have sufficient funds to post bail, set at $21,000 (Tr. 17; Tr., Preliminary Hearing, p. 54).

the rail, to give advice if requested, but was not permitted by the court to raise objections or speak during trial (Tr. 17-19, 55-56, 59-60).[18]

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[18] Until about two weeks before trial, petitioner had been represented by the public defender, who appeared in person or through an assistant at both the preliminary hearing and arraignment (Tr., Preliminary Hearing, p. 2; Tr. 3-6). Petitioner then moved for the appointment of outside counsel, on the ground that the public defender's office had lost an unduly large number of cases and appeared, in his opinion, to have an organization that was no match for the district attorney's office (Tr. 15-16). The court denied the motion, but allowed petitioner to proceed in *pro per* when he refused to continue with the public defender (Tr. 16-19). Because of the nature of the charges, though, the court ordered the public defender to have a member of his office sit in court and be available to defendant (Tr. 17-19). The public defender objected to this procedure, calling defendant a "wise guy" in front of the judge and arguing that "this mixed marriage won't work" (Tr. 18).

Shortly thereafter, before a different judge, petitioner renewed his motion for outside counsel (Tr. 30, 34). He said he did not believe the public defender was qualified (Tr. 32-33) and that he would rather have a private lawyer, "because he has a reputation to uphold and * * * is going to fight for his reputation" (Tr. 34). This motion too was denied (Tr. 39-47), though it was brought out that petitioner had only a 6th grade education (Tr. 42), that he had been hospitalized in a mental institution while serving time in Illinois (Tr. 43), and that he was emotionally upset about the charges because he had said he was not guilty (Tr. 44).

The motion was made a third time, immediately before trial, when petitioner asked for any counsel other than the public defender (Tr. 54). Again it was denied (Tr. 54). Petitioner repeated that he was entitled to counsel he believed competent (Tr. 55) and objected to the order for the assistant public defender to sit in the courtroom, but was overruled (Tr. 59).

For further details on the pretrial hearings concerning right to counsel, see the argument (pp. 97-106, below).

A. Evidence Adduced

1. *State's Case*

(a) *Preliminary Exhibits and Testimony*:

The State opened its case by marking for identification, in front of the jury, a series of documents, notes and reports (A. 33-39). These were introduced through the police inspector who had been in charge of investigating the case (A. 33).

The inspector first identified a list of persons contacted during the investigation (P.X. 1 for identification, A. 33-34); his notes of conversations with witnesses (P.X. 2, 4, 5 and 6 for identification, A. 34-35); his *notes of a conversation with defendant* (P.X. 6 for identification, A. 35); notes made during the line-up (P.X. 3 for identification, A. 35); the "arrest report" (P.X. 7 for identification, A. 35); and "robbery and theft" reports for each of the three liquor stores covered by the charges (P.X. 8-9, 10-11, 12-13 for identification, A. 36-38).

Next he identified a two-page "case report" (P.X. 14 for identification, A. 38). He said that he typed this document after the investigation and that it contained *"the information needed for prosecution of this case"* (emphasis added) (A. 38). In response to a question by the district attorney, he said the report referred to all three counts (A. 38).

Finally, the inspector identified a three-page document, which he described as the statement he took from the defendant on the 5th of May (P.X. 15 for identification, A. 38-39). Petitioner immediately objected to the statement

"being admitted in evidence," but was overruled (A. 39). The inspector then concluded by stating that all notes of conversations and all statements taken during the investigation were included in the documents he had just examined (A. 39).

No explanation was made to the jury by the inspector, the district attorney or the court, that the May 5th statement was not a confession or other admission of guilt, but in substance a denial of the charges (P.X. 15 for identification, *supra*). Nor was it explained that the notes of the conversation with defendant (P.X. 6 for identification, *supra*) showed that he had claimed innocence, rather than incriminating himself. Instead, the court dissuaded petitioner from asking questions about the various documents (A. 40-41), and implied, by comments in the presence of the jury, that their contents were somehow harmful to him (A. 41).[19]

Next, the State showed the jury a diagram of the streets in West Oakland (P.X. 28, A. 43, 249). The diagram was not drawn to scale, nor did it show actual distances (A. 45-47). But over petitioner's objections, it was marked by an employee of the district attorney's office to show the locations of the places involved in the case and their relationships to each other (A. 45-49).[20]

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[19] The district attorney stated that his only purpose of offering the documents was to put on the record they had been delivered to defendant (A. 41). He did not explain why he chose to do this in front of the jury, particularly since receipts for most of them (including the May 5th statement, the robbery reports, and the case summary) had been signed by defendant and were already on file with the court (Clerk's Transcript on Appeal, pp. 12, 19 and 21).

[20] The court said that the diagram could be used to show the locations of streets, but not distances (A. 46, 47, 249). It overruled

(b) *The Attempted Robbery and the Two Robberies*:

Then came testimony to the events in the various liquor stores, the time sequences between the offenses charged, and the identity of the robber. Much of this testimony has already been described elsewhere in this brief (see pp. 5-11, above). It was given, in sequence, by Wong and Jow (count one), Perry, Griffith and Jones (count two), and Pauletich and Slaise (count three).

Wong and Perry, on direct examination, testified in part to identifying petitioner in the line-up (A. 59-60, 129-130, 131-132); Perry, in addition, testified to petitioner's silence, when accused in the corridor, outside the line-up room, of being the man who held him up (A. 131-132). Pauletich, on direct examination, testified to identifying petitioner in his store, when brought there on the night of the robbery, by the police (A. 193-194).

Cross examination of Pauletich later exposed the other circumstances of the in-store identification (see pp. 13-14, above). Similarly, cross examination of Wong and Perry, and also of Jow, Griffith and Jones, revealed the background of the line-up and disclosed the setting in which it occurred (see pp. 14-20, above).

Twice the jury heard Pauletich go beyond the questions asked—once, on direct examination to say of petitioner, when brought into the store:

> "He was captured. They got him at the next store that he tried to hold up, I presume" (A. 193).

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petitioner's objections that the diagram should be an authentic map, to afford a true picture of the area (A. 45-46). The exhibit no longer exists, having been removed and destroyed (see fn. 1, above).

—and then, on cross examination into his report of the robber's clothing, to assert:

> "* * * and they [a police officer] said it seemed to fit the description of the two previous robberies that were reported to him" (A. 195).[21]

So too the jury heard Griffith answer nearly all petitioner's questions about the robber in the second person, rather than the third as called for by the questions, and as used by most of the other witnesses (for Griffith's cross examination, see A. 164-177).

Perry, in addition, accused petitioner of "trying to play * * * dumb," in cross examining about the robber (A. 139).

Each of the above persons, with the exception of Slaise, also pointed to petitioner in court, as the robber. But their over-all testimony left room for doubt. Wong, Jow, Perry, Griffith and Jones each acknowledged, of course, that he had already been shown petitioner in person at least once before, by the police—as had Pauletich (see pp. 13-20, above). Jow, Griffith and Jones admitted they had been shown photographs of petitioner shortly before trial (see pp. 23-26, above), and Wong and Pauletich admitted to conflicts in their testimony at trial, as compared to their descriptions of the robber at the preliminary hearing (see p. 22, above).

Perry, who first said he would never forget the robber's eyes (A. 131), could not then recall whether in addition the robber wore any thick or heavy grease on his face, or whether he did not (A. 137-138). Jones, on direct examination, said only that petitioner "looks like him" (the robber)

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[21] The court ordered the jury to disregard the first statement, but not the second (A. 193, 195).

(A. 179), but then changed his testimony on cross examination, and claimed he was positive (A. 180). Slaise, on the other hand, said that he could not describe or identify the man he saw the night of the robbery at all (A. 225).

There was no agreement, from the testimony, on the robber's face:

(i) *scar:*

Wong testified to a scar on the lower part of the cheek and the nose, at the base of the nose, on the left side of the robber's face (A. 75-76). Then he admitted he had testified that the scar was on the other side—the right side—at the preliminary hearing (A. 76-77). And he said he did not remember reporting any scar to the police the night of the robbery (A. 94-96).[22] Jow first said that he did not tell the police about a scar (A. 112-113), but then changed his testimony and said that he did (A. 114). Perry said there was a mark or scar above the left corner of the lip (A. 129). Griffith also said there was a scar, but located it first on the left cheek—right down by the jaw—and then by the lip, by the corner of the nose (A. 166). Later he testified that when shown peti-

[22] When petitioner produced the police report for the robbery and asked Wong if he saw any remarks on it about a scar, the court interrupted before Wong could answer and told petitioner that whether Wong saw a scar in the report or not would be immaterial (A. 97). The court then advised petitioner to talk with the assistant public defender about mentioning the report (A. 97). The record does not show whether such conversation occurred, but thereafter petitioner made no further use of the report in examining Wong (A. 97-98). In fact, the report contained no reference to a scar, or other distinguishing characteristic of the robber (P.X. 9 for identification, A. 37; see also pp. 6-7, above).

tioner's photograph, he did not notice any scars, adding he did not pay any attention whatsoever (A. 173). Jones admitted he saw no scars on the robber's face (A. 180), but claimed he saw one in viewing the photograph, before trial (A. 185). Pauletich said he saw a "mark * * * a scar or a scratch or something" (A. 195), but was not asked to identify on what side of the robber's face it was. None of the witnesses were asked to point to any scars or marks on petitioner's face, as he appeared in court at the time of trial.

(ii) *mustache:*

Wong said the robber had a mustache (A. 90); Jow and Jones, a "little" mustache (A. 113, 180) or a "shade of it" (A. 113). Perry said he only slightly remembered whether the robber at his store had a mustache (A. 131), but that he did not remember reporting a mustache to the police (A. 142, 150). Griffith did not pay any attention to a mustache (A. 171-172, 175), and Pauletich didn't notice any mustache at all (A. 196-197).

(iii) *hair (goatee) along the lower lip:*

Wong said he did not see any hair on the robber's chin or lower lip (A. 90-91). Jow, on the other hand, said there was a "little bit" of whiskers along the bottom lower lip (A. 113). Perry did not remember any hair on the robber's lower lip (A. 134). Griffith said he did not pay any attention to the lower lip (A. 175), and Jones testified he saw neither a goatee on the lower lip, or any beard (A. 180-181). Pauletich said it looked like there may have been hair on the lower lip, but was not sure (A. 197). He did not see

any hair on the lower part of the robber's chin (A. 197).[23]

Likewise, there was no agreement, from the testimony, on the robber's clothing:

(iv) *hat:*

His hat was variously described as: *dark* (Wong, A. 64, 73; Jow, A. 110, 117; Pauletich, A. 205); *brown* (Perry, A. 129, 138; Pauletich, A. 196); *dark brown* (Perry, A. 133); *oxford gray* (Perry, A. 133); and *grayish* (Griffith, A. 165). One witness said it had a "stingy" brim (Perry, A. 133), another implied the brim was turned up all the way around (Jones, A. 179). Pauletich remembered a feather (A. 194), but Perry did not (A. 133). Jones said the hat was "kind of old" (A. 179). Griffith, on the other hand, remembered a rag-looking band around the hat, but noticed little else, because he was afraid (A. 165).

(v) *coat:*

The robber's outer garment was described as: *a sport-type coat* (Wong, A. 56, 63); *a sport coat* (Jow, A. 110; Perry, A. 127; Pauletich, A. 194); *kind of*

[23] The "mug" shots of petitioner, and the line-up photograph, were also in evidence, in addition to the above testimony (D.X. A, A. 91; D.X. B, A. 105-106). The "mug" shots showed a trimmed, clearly defined growth of decorative whiskers under the center of petitioner's lower lip (D.X. A, A. 91). Along with the line-up photograph, they also showed a mustache along the entire length of petitioner's upper lip (D.X. A, A. 91; D.X. B, A. 105-106). The "mug" shots showed what appeared to be a scar on the right cheek of petitioner, and a large, pronounced scar running outward from petitioner's left upper lip. But, as indicated by the conflicting testimony of Jones and Griffin, there may have been difficulties observing the scars in the photographs (A. 173, 185).

a sport coat (Jones, A. 179); *a coat* (Griffith, A. 165); and *sport coat or sport jacket* (Pauletich, A. 203, 210-211). It was said to be a *dark color* (Wong, A. 87); *dark gray* (Jow, A. 117); *lighter than the robber's trousers* (Jones, A. 179); *grayish* (Griffith, A. 165; Pauletich, A. 198); and *gray* (Griffith, A. 165; Pauletich, A. 198). Perry said the coat had a little check pattern (A. 127), but Griffith said it was striped (A. 165).

(vi) *shirt:*

Wong saw a yellow, or kind of yellow, shirt on the robber (A. 64, 70, 81-82, 86). First, he testified it had flowers on it, "[s]ome kind of spots" (A. 82); but then he said it had "a little flower" (A. 86); and finally he admitted he was not positive it had flowers at all—"it happened so fast, you don't recognize it," he said (A. 86). Jow testified to a yellow shirt with some dots on it (A. 117); he said it did not have a flower design, but that it was a flower (A. 117). Griffith could only recall "kind of * * * a yellowish-looking" shirt (A. 166). He did not know whether it had a flower on it (A. 175). Jones did not know what kind of shirt the robber had on, because he got only a slight look at him (A. 181). And Perry didn't remember what the shirt looked like, because he didn't pay attention to it (A. 129). Pauletich, on the other hand, thought the man who robbed his store had on a shirt with a floral pattern, but he did not know what color it was (A. 198). Nor was he entirely sure that it was a flower-type shirt, since he did not think too much of it was exposed (A. 204).

(vii) *trousers:*

No one remembered too much about the robber's pants, except Jones, who indicated they were darker than his coat (A. 179, ~~182~~). Perry was not asked any questions about them. Griffith said he did not pay attention to them, and could not give their color (A. 166). Neither could Wong (A. 87). Neither Wong nor Jow could say what type of trousers they were (A. 86, 120); and Pauletich said he did not notice the trousers at all, and did not think he gave the police any description of them (A. 195).

When the district attorney exhibited a hat, coat and shirt taken from petitioner after his arrest, he did not ask the witnesses whether, in fact, this was worn by the robber. He instead limited his questions to whether there was a resemblance (A. 63-64, 110, 129, 179, 194). He did not show any of the clothing to Griffith or Slaise. He showed only the hat and coat (but not the shirt) to Perry, Jones and Pauletich (A. 129, 179, 194). Wong and Jow saw all three (A. 63-64, 110).

Wong said there was a resemblance (A. 63-64). Jow said the coat resembled the one the robber had on, but then volunteered the hat and shirt were the same (A. 110). Perry, who saw the hat and coat, said only that there was a resemblance (A. 129). Jones said the coat looked "something like" the one he saw at the robbery (A. 179)—but later changed this testimony, saying that the clothes worn by petitioner in the line-up were "the same * * * he had on the night of the robbery" (A. 182), and that the line-up coat looked "just like" the one shown at trial (A. 183). Pauletich took the opposite course. At first he testified

that the hat and coat resembled those worn by the robber (A. 194), and that petitioner was wearing the same hat and coat when brought into the store by the police, as when the store was robbed (A. 194, 201, 205). But then he refused to say whether the hat he saw in court could be deemed a shade of brown (A. 205), which was the color of the hat he testified he saw on the robber (A. 196, 205).[24]

(c) *Closing Testimony and Exhibits*:

The last two witnesses for the State were Smith, the clerk at the store where petitioner was arrested, and Nielsen, the officer who made the arrest (A. 226, 238). Much of their testimony has been described elsewhere in the brief (see pp. 11-13, above).

Smith said petitioner came into the store shortly before midnight, asked if he owned the store or worked there, and then asked if he had a gun (A. 226-227). The court overruled petitioner's objections to this testimony and held that

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[24] At the outset, petitioner moved to suppress use of his hat, coat and shirt on the ground they had been illegally seized (A. 61). He argued they were taken from him after an illegal arrest, and prior to the time he was brought before a magistrate (A. 62). His argument—somewhat garbled—was that the arrest was illegal, because made without a warrant, and that as long as he was not brought before a magistrate, he was in the status of being illegally arrested (A. 62). He also pointed out that he was not brought before a magistrate until Tuesday, over three days after his arrest (A. 62). The court denied the motion (A. 62-63). Later, at the close of the State's case, petitioner objected to admitting the hat, coat and shirt in evidence, on the grounds they were immaterial to the case, and that there was no testimony that the coat was the one actually worn by the robber (A. 250). The motion was denied (A. 250).

The hat, coat and shirt have been removed from the files of the Superior Court and destroyed by the district attorney's office. They were not available to counsel in preparing this brief. The removal occurred in April, 1966, during the first remand (see fn. 1, above).

it was material (A. 227). Smith then repeated the conversation, adding:

> "And then I told him why did he ask me that, and he told me, 'Well, I might want to hold you up'" (A. 228).

Smith said the police then walked in, that petitioner proceeded to ask for a half pint of whiskey, and that he told the officers he did not like just what petitioner had said (A. 228). Smith testified petitioner was right across the counter from him, and that when he told the officers what petitioner had said, petitioner did not say anything that he could remember (A. 228).

The State next asked Smith if he heard any conversation about a gun at that time (A. 228). But instead of answering the question, Smith replied:

> "Well, I told the officers what he had said, *and he told me that some places had been held up, and he told Mr. Banks, 'Buddy, you fit the description,'* and he began to search him" (emphasis added) (A. 228).

After this, Smith said he could not recall petitioner saying anything about a gun (A. 228). Later he testified that he could not remember whether petitioner had either of his hands in his pocket, when he came into the store (A. 229).

Cross examination showed that petitioner had been in the store three to five minutes before the police arrived (A. 230); that he had not made any attempt to rob Smith (A. 230); that when the police asked where he got the money in his pocket, he said he worked for it (A. 231-232); and that Smith did not see any gun on petitioner (A. 232).

The court, on its own motion, returned to the accusation by the police officer, and in the presence of the jury pressed Smith for details (A. 232-233). Twice it repeated the accusation—once as "There has been some robberies, and you fit the description"—and next as, "Some robberies had been committed and you fit the description" (A. 233). It then asked what petitioner had said, and what he had done, and twice Smith said, "nothing" (A. 233). "Nothing," the court repeated, "all right" (A. 233).

Under questioning by petitioner, Smith testified again that he heard petitioner say he worked for his money (A. 233). Smith said he did not remember petitioner asking the officer what robbery he was referring to or talking about, or where or whom did he rob (A. 233-234). He volunteered that it stood out in his mind that petitioner did not say anything (A. 234). Then Smith admitted once more that petitioner had been in his store for about five minutes before the police came in, that a woman had been killed in the store some time earlier, and said that he did not deny telling petitioner about this that night (A. 234).[25]

Nielsen, the last witness, testified in part to arresting petitioner, searching for a gun, and to *"recover[ing]"* money out of the breast pocket of his shirt and later, at the police station, out of his pants pockets and wallet (A. 239-

[25] Petitioner moved to strike all of Smith's testimony on the ground Smith had not connected him with any of the offenses charged (A. 237). But the court denied the motion (A. 238). It ruled that Smith had connected petitioner on one thing, if nothing else, namely the "adoptive admission" (A. 237). This referred to petitioner's silence in response to the accusation described by Smith (A. 228, 232-233).

There was no charge, however, that petitioner had actually robbed, or attempted to rob, Smith, or that petitioner had engaged in any unlawful conduct on the premises (A. 1-3).

241). He said the money was in denominations of $10's, $5's and $1's, and that with the exception of the money in the wallet, the rest was loose and crumpled (A. 241). But he did not specify how much money was in his pockets, as compared to the wallet (A. 239-241).[26]

He said that at the time he went into Smith's liquor store, he had received reports on the radio about robberies (A. 241). He did not relate the contents of the reports (A. 241).

Finally, he said that he had an oral conversation with petitioner at the police station, which one other officer might have heard (A. 241-242). He said the conversation had not been reduced to writing in any fashion (A. 242; see also A. 243). He described the statement made by petitioner as free and voluntary (A. 242, 244), and acknowledged that it was "in relation to the incidents of that night" (A. 244). He said:

> "My interest was in the possibility of a gun. I asked Mr. Banks, I said, 'What did you do with the gun, Fred,' and Mr. Banks answered that by saying, 'I didn't have a gun.' He said, 'If I had one, I would probably have killed somebody tonight.' He said, 'Guns make me very nervous'" (A. 244).[27]

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[26] Nielsen said he counted 31-one dollar bills among the other denominations he found on petitioner (A. 241). He found no 20's (A. 241, 248). Pauletich had earlier testified the robber took somewhere between 30 and 40-one dollar bills—but Pauletich also said the robber took bills in denominations of 20's (A. 194).

[27] Petitioner objected to this testimony, on the grounds that there was no actual proof he made any statement, that he did not see any copy of the statement, and that he did not know what statement the officer was talking about (A. 242-243). This objection was overruled (A. 243). So was a later objection by petitioner—somewhat

Cross examination showed, among other things, that at the time petitioner was arrested, he told Nielsen that he lived in Pittsburg, and that if he called to Pittsburg he could verify the statement by petitioner as to where he got the money that was in his pockets, but that the officer did not investigate along that line (A. 248). Nielsen said he recalled petitioner saying that he had gotten paid recently, and also a statement by petitioner that he didn't rob anybody at any time either (A. 247-248).

After Officer Nielsen's testimony, the State offered miscellaneous exhibits in evidence—including the hat, coat and shirt taken from defendant—and then rested (A. 249-250).

2. *Defendant's Case*

Defendant opened his defense by stating to the jury that he was an out-of-town resident, that he lived alone in Pittsburg (California), and that he would prove that this was a case of mistaken identity—"mistaken identity made or raised either from unconscience ignorance, forgetfulness and misplace of confidence" (A. 250)—and that the mistaken identity was encouraged by the police and the State's attorney (A. 250).

He said that he worked and that he earned the money which was taken from him (A. 250).

He concluded by saying that the State had left so much out that it would have proved his innocence if all the facts

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garbled—that the officer would not agree with him on whether he, or the officer, said something about a constitutional right involving a statement (A. 243). The court said the fact the officer was not going to agree with defendant was "hardly an objection," and that if defendant was saying the officer didn't inform him of the constitutional right, that was not required (A. 243-244).

would have been in, and that he would not then have to put on a witness or a defense (A. 251).

As his first witnesses, defendant called four different persons who lived in Pittsburg. They testified they had paid defendant various sums for plumbing and other work shortly before the time of his arrest (A. 251-258). These sums totaled approximately $198 (A. 251, 254, 258).

One of the witnesses (Pollard) said that he had known defendant to carry as much as $150 to $200 on his person, and that the day before defendant was arrested, he saw him with as much as $150 in his possession (A. 255). He added that he had paid the defendant for work two days prior to the arrest, and that it was "kind of amazing" that defendant was picked up (A. 256). The last comment, however, was stricken (A. 257).

Defendant next called the police officer who investigated the attempted robbery of Wong (count one) and the robbery of Pauletich (count three) (A. 258-262).

As to Wong, the officer testified that the "Reporting Party" had said he pulled a gun and struck the robber on the hand *or arm*" (casting doubt on Wong's assertions that he had brought his .38 down on the robber's hand; see pp. 5-6, 19-20, above) (A. 260). He did not recall if the "Reporting Party" said the robber had a mustache, but he said he did not write down a mustache in his report (casting doubt on Wong's testimony that he saw a mustache; see p. 34, above) (A. 260).

As to Pauletich, the officer testified that the "Reporting Party" estimated the loss at $175 to $200 (contradicting Pauletich's testimony that the loss was about $165; see p. 11, above) (A. 261-262).

Defendant then called the officer who investigated the robbery of Perry (count two) (Tr. 531, 536). But this officer did not appear (Tr. 531).[28]

The court later read a stipulation that if the officer had appeared, he would have testified that he was one of the officers investigating the robbery of Perry (count two); that he interviewed the reporting party; and that the reporting party informed him "that the suspect got a little better than 70 to $80.00" (A. 262).

Defendant then announced that he rested his case (A. 263).

The court immediately called the assistant public defender, the defendant and the district attorney to the bench, where in view of the jury there was an off-the-record discussion (A. 263). The clerk's transcript states that the court explained to defendant that he had a right to testify in his own behalf if he desired to do so, and that if he failed to testify, the judge had a duty in his in-

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[28] The defendant advised the court that the officer had been subpoenaed (Tr. 532; see also A. 212-214). He added that he could not tell whether service had been obtained, because he was confined in jail (Tr. 532).

The Sheriff's Department received the subpoena on Friday, noon, for the officer to testify on Monday (Tr. 534). It made no effort to obtain personal service, but instead left only a copy of the subpoena with a police patrol sergeant (Tr. 534; Clerk's Transcript on Appeal, p. 34). On Monday, the sergeant said the officer was on vacation and would not be back for two weeks (Tr. 534).

Defendant asked for a continuance to see if the officer could be located (Tr. 538). He said that actual testimony, as compared to proposed stipulated testimony, would have greater impact on the jury (Tr. 537-538, 539, 540-541), and that the police department might know where the officer was vacationing (Tr. 540). The court denied the continuance, accused defendant of being "negligent" for not subpoenaing the officer earlier, and ordered him to accept stipulated testimony, or none at all (Tr. 540-542).

structions to comment to the jury on the failure of defendant to so testify (Clerk's Transcript on Appeal, p. 31). It then shows the defendant elected not to testify (*ibid.*).

Following this discussion, the court recognized the district attorney for his opening argument (A. 263).

B. Arguments to the Jury

1. *Opening Argument*

The opening argument lasted about 22 minutes (Clerk's Transcript on Appeal, p. 31). The district attorney reviewed the events at the three liquor stores, pointing out that in each case the robber had his hand in his right coat pocket, and that Wong, Jow, Perry, Griffith, Jones and Pauletich all testified or identified defendant as the man (A. 264-267).

He pointed to the identification by Pauletich when defendant was brought into the liquor store about half an hour later by the police officer; to the testimony of Slaise that he saw a man come out of Pauletich's store and go down the street, and that Slaise then saw a car pull away and after that didn't see the man any more (A. 267).

He pointed to the circumstances of the arrest; to Smith's statements that defendant asked if he had a gun and then said he just might want to hold Smith up; to the search at the liquor store; and to testimony by Smith that he saw money in different pockets (A. 267-268).

He pointed to Smith's testimony that the officer made a statement, "You look like a suspect in some other robberies," and that the defendant had made no reply (A. 268).

He then said that the main issue, as all the jurors could recognize, was one of identification (A. 268). He added that he did not think there was any question about whether the robberies actually occurred (A. 268). Repeating himself, he stated:

> "The real issue is one of 'Was the Defendant here, Fred Banks, the person who committed those three offenses that he is charged with?'" (A. 268).

Next, in any identification he said:

> "* * * there is a question for the jury to decide as to how good the identification is. There are many factors in identification which may tend to improve the faults of the identification or to make it less good" (A. 268).

From there the district attorney went on to discuss the various factors the jury could consider (A. 268-271). He said there was good opportunity to observe the person at the time of the crimes (A. 268); that short distances were involved (A. 269); that a number of witnesses identified defendant (A. 269); that five of the witnesses, including the two Chinese persons, all testified they identified defendant at the line-up (A. 269) (a misstatement of the evidence; see p. 18, above); that defendant was arrested and "brought back" within half an hour to the liquor store where he was identified by Pauletich (A. 269); and that this was not a situation where before the line-up, at which the witnesses identified defendant, they saw any pictures (A. 269).

He said that another factor to support the identification was the similarity of operation in each of the three offenses;

that in each the person committing the offense had his right hand in his coat pocket; that in each there was testimony he had a sport coat and dark colored hat on; that all offenses happened in a short time, in the same area, as the jury could see from the diagram; that the defendant was arrested within a few blocks, as the jury could see from the diagram, from the three offenses with which he was charged (A. 270).

He next referred to the testimony of the arresting officer as to the denominations taken from defendant, the $176 on his person, and the 31 one-dollar bills (A. 270). He said the officer testified that this money was taken from various pockets of defendant (adding, "I think he described both pants pockets, a shirt pocket, and a wallet" (A. 270)) and suggested to the jury that it was "quite unusual for a person to have that quantity of money distributed around in different pockets, crumpled up, as described by Nielsen" (A. 270) (a distortion of the testimony, since it implied that all or most of the money was in the pockets; see p. 41, above). He then asked the jury to recall the testimony of Pauletich, who said part of the money taken included "about thirty-some-odd" one-dollar bills (A. 270).

And finally, he said:

> "Now, another factor which I think you can consider in a case of this kind is the failure of the person charged to take the witness stand and testify in his own behalf.
>
> "I think you will be instructed on that by the Court, and I think the instruction is to the effect that if a person does not see fit, which he, of course, does not have to do, to take the witness stand to deny evidence

> that has been presented against him, that you, as the jury, may consider that that evidence may—you can take that failure to testify as indicating that the Defendant would be unable to deny it.
>
> "Well, at any rate, the instruction will be given to you on the person's failure to take the witness stand, and you will, I am sure, understand it and be able to apply that to this particular case" (A. 271);

and then immediately concluded:

> "Well, ladies and gentlemen, that is the evidence in this case. I submit that the evidence proves beyond any reasonable doubt that the Defendant in this case is guilty of the three offenses with which he is charged" (A. 271).

The court thereafter recessed for the day (A. 271).

2. *Defendant's Argument*

Defendant's argument the next morning lasted a little over an hour (Clerk's Transcript on Appeal, p. 32) (A. 272-292).

He said he did not know the person who robbed Wong (A. 273).

He said Wong described the robber as 5'6", 150-160 lbs., whereas defendant was 5'10½", 180 lbs.—but the court ordered this comment stricken on the ground there had been no evidence of defendant's size and weight (A. 275).

He also said he wasn't there, at Wong's robbery, so that all he could do was cross examine and attempt to find discrepancies (A. 277).

He argued, in general, that Wong, Perry, and Pauletich had been impeached, and could not be believed. Various inconsistencies in their testimony were cited (Wong: A. 273-277; Perry: A. 277-280; Pauletich: A. 282-284).

He argued that Jow had a motive for supporting Wong, because Jow was employed by Wong (A. 276).

He pointed out that the State had taken steps to make sure Wong and Jow would be able to identify defendant; first, by showing Jow a photograph before trial; second, by seating Wong and Jow in the courtroom during selection of the jury, where they could see defendant (A. 276).

He referred to inconsistencies between the descriptions of the robber given in court, and the descriptions actually reported to the investigating officers, at the time of the offenses (Wong and Jow: A. 275; Perry: A. 279; Pauletich: A. 283-284).

He referred to inconsistencies between testimony at trial, and testimony at the preliminary hearing (Wong: A. 273, 275-276; Perry: A. 277, 279; Pauletich: A. 282-283).

He asked why the State had shown photographs to Griffith and Jones (A. 280-281), and why Mrs. Pauletich, who handed over the money at one of the robberies, had not been called to testify (A. 281-282).

He referred to other cases of mistaken identification (A. 285).

He discussed his conduct in the liquor store where arrested—pointing out that the robber had not stopped to make conversation or to ask anyone if he had a gun (A. 285-287).

Again he referred to the showing of photographs to witnesses shortly before trial, and also clothing, and again asked why this had been done (A. 288).

And then, on the crucial issue here presented—the comment on his failure to take the stand—he said:

> "Ladies and gentlemen, the State's Attorney commented on why the defendant in this case failed to take the stand.
>
> "One reason I didn't take the stand, ladies and gentlemen, is that I didn't believe the State had proven its case.
>
> "It hadn't introduced any evidence here to show that the defendant was the robber suspect, was the guy running around robbing those people. They haven't produced any evidence.
>
> "They produced evidence that he looks like the man, he is similar, those clothes are similar. That is all the evidence they produced" (A. 288).

Shortly thereafter he concluded his argument (A. 288-292).

But three times, referring to the evidence, he lapsed into statements of matters within his personal knowledge, and three times the court ruled in the presence of the jury there was no evidence of such facts, because he had not testified (A. 289-290, 290-291; cf. A. 291).

He discussed finally the wages paid him, and argued that he made good money, that he did not have to rob anyone, and that he had an honest profession, as a plumber (A. 291). Why should he rob anyone, he asked, when

only one or two days' work would produce a hundred dollars (A. 291).

Then, summing up, he referred again to inconsistencies in the testimony (A. 292), to the common experience of mistaking one person for another on the street (A. 292), and concluded:

> "So that is all I can say in this particular case, that I didn't rob anyone" (A. 292).

But again there was an objection that defendant was testifying, and again the court agreed (A. 292). So defendant rephrased his conclusion, to tell the jury:

> "So, ladies and gentlemen, after hearing all of the evidence, I don't understand how you could arrive at any other verdict after the State has failed to prove its case but to bring in a verdict in favor of the defendant, that he is innocent" (A. 292).

3. *The Closing Argument*

Closing argument followed immediately (A. 293-301). It lasted about 20 minutes (Clerk's Transcript on Appeal, p. 32).

The district attorney argued that discrepancies in the testimony were minor and that the jury could not expect the witnesses to give exactly the same descriptions (A. 293-294).

As to coaching the witnesses to identify defendant, he argued that six witnesses made positive identifications at trial; that the manner in which the line-up identification was made, the day after the arrest, was important, because

there was no evidence that any of the witnesses were shown photographs beforehand; and that as to showing photographs afterwards, it was just "normal procedure" for any attorney to want to talk with his witnesses (A. 294-295).

He said the jury could not expect a positive identification of the robber's clothing (A. 295); also, that it was immaterial some of the police reports did not list a mustache or scar, because there was no evidence the officer had asked about them (A. 295-296).

As to Mrs. Pauletich, he said defendant could have called her, if he wanted to (A. 296).

Returning to the line-up, he argued the officer had told the witnesses not to talk when they came up to the window, that each made an identification by himself, and that there was no evidence any witnesses encouraged another to identify defendant (A. 296).

And then, as to defendant's statement there was no evidence to show he was the robber, he again argued that six persons had identified defendant, adding that several recalled seeing a scar on the left side of his face—and that the witnesses also said the clothing worn by the robber looked like the clothing shown in court (A. 297).

He went on to argue that in addition to the eye-witness identification, or direct evidence, there was also a considerable amount of circumstantial evidence in the case (A. 297). He said there was some circumstantial evidence he wanted "to particularly point out" (A. 298).

First, he referred to the manner of the person committing the crimes (A. 298). He said that two witnesses had described the robber as very "cool"; that one witness had

said, "cool, just like you are right now"; and then argued that he was sure the jury, from its own observations, could likewise see that defendant was "cool" (A. 298).

Next, he referred to the manner in which the crimes were committed (A. 298). He said that in each one the robber had his right hand in his coat pocket, simulating a gun, and that this tended to show the same person had committed all three (A. 298). He argued that even if one identification was not very good, the jury could infer the same person committed the offense, if the others were committed in exactly the same way (A. 298).

Next, he referred to the accusatory statements made in defendant's presence (A. 298). He said that when such statements were not immediately denied, the inference was an admission of guilt (A. 298). He then described the two accusations that defendant was the robber—the one by Perry at the line-up, the other by the police officer at the arrest—and said that defendant had made no reply (A. 299).

Next, he referred to the testimony that the robber took a considerable number of one dollar bills from Pauletich, and that defendant had 31 one-dollar bills in his possession, in different pockets, crumpled up (A. 299). He argued that if a person is found shortly after a robbery with similar denominations of money, crumpled up, that was some circumstantial evidence of the offense (A. 299).

Finally, he referred to defendant's failure to testify, and said:

> "Now, also, the defendant here, as you know, has failed to testify in his own defense.

> "I think you will be instructed on that point that where there is evidence in the case that the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, and he does not testify, the jury can consider that failure as tending to indicate the truth of such evidence, and as indicating that among the various inferences that you could draw from the evidence, those inferences unfavorable to the defendant are the most probable.
>
> "And you have that situation here" (A. 299).

Turning to the money ($198) earned by defendant, he said there was no evidence defendant had that much money in his possession at the time of his arrest, or that the money he had was the same (A. 300).

> "Actually," he said, "this happened right around the first of the month, *and we don't know exactly what defendant's circumstances are because he hasn't testified before you*" (emphasis added) (A. 300).

He argued the jury could not know "but what" defendant might have paid various bills with the money (A. 300).

Last, as to motive, he argued:

> "He says why should he have to rob. *Well, that is a question you could ask of many persons who commit robberies,* who might very well be employed but still commit them" (emphasis added) (A. 300),

and then concluded:

> "Well, ladies and gentlemen, that is the substance of the evidence in this case" (A. 300).

Briefly, he went on to say that proof beyond a reasonable doubt did not mean proof to the exclusion of any possible doubt or to a mathematical certainty, but only that the evidence must convince the minds of the jurors and satisfy their consciences (A. 300). He ended:

> "At any rate, I ask you when you consider this case to consider all the evidence very carefully, and *I don't think you should consider any particular piece of evidence in an isolated fashion, but you should consider all of the evidence together*" (emphasis added) (A. 301).

C. Instructions to the Jury

Immediately thereafter the court gave its instructions to the jury (A. 301-313). It instructed on both direct and circumstantial evidence (A. 303-304); included, in addition, were the following:

1. *Admissions by Silence*

> "If you should find from the evidence that there was an occasion when the defendant, under circumstances which fairly afforded him an opportunity to reply, *failed to make denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which he is now on trial or tending to connect him with its commission,* and if you should find that he heard the accusation and understood its nature, *the circumstance of his silence and conduct may be considered against him as indicating an admission that the accusation thus made was true.*
>
> "Evidence of such an accusatory statement is not received for the purpose of receiving the truth but only to explain the conduct of the accused in the face of it.

"Unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement" (emphasis added) (A. 305).

2. *Failure to Testify*

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

"As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

"The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt" (emphasis added) (A. 308-309).

Also included—without support in the record—were (i) instructions that evidence had been offered to show defendant had committed a crime other than the ones for which he was on trial, but which could be considered in determining his guilt or innocence (A. 308) and (ii) instructions on armed robbery and robbery by torture (A. 310).

After deliberating for about an hour and fifty minutes, the jury returned a verdict of guilty on all three counts (Clerk's Transcript on Appeal, p. 32) (A. 313-314).

The Appeal

Petitioner filed a timely notice of appeal, and about two months later counsel was appointed (A. 315). A little over a year and a quarter went by before counsel filed a brief (eleven months after the expiration of his last extension) (A. 316). Argument was had, and two days later the Court of Appeal filed an eight-page typewritten opinion, affirming the conviction (A. 317).

Counsel the next day wrote petitioner a letter, withdrawing from the case (A. 323).

When the case was remanded to the Court of Appeal for further proceedings in light of *Griffin* v. *California,* petitioner requested appointment of counsel to aid in preparing a brief (A. 327). He pointed out that original counsel had failed to see any constitutional errors, and asked for someone else (A. 327). He also asked for permission to appear and argue his case, if counsel were not appointed (A. 327-328). The court denied both requests (A. 329). It stated that original counsel still represented petitioner, that no different attorney would be appointed, and that if either petitioner or original counsel wished to submit some further written argument, they could do so (A. 329).

Petitioner thereafter prepared and filed a brief, in *pro per*. The State submitted a page and a half letter, asserting that the evidence was overwhelming and that petitioner had failed to make any factual argument to support his contention of a miscarriage of justice (A. 331). About a week later, the Court of Appeal filed a three-page opinion, again affirming the conviction (A. 332). No oral argument was heard.

When the case was remanded a second time, for further consideration in light of *Chapman* v. *California*, petitioner again requested appointment of counsel, or the right to appear in person to participate in oral argument (A. 335). Again requests were denied, for the same reasons as before (A. 337).

Petitioner then submitted a brief in *pro per*, but repeated once more his requests for counsel, or the right to come from prison and argue his case (A. 338). Both were again denied (A. 338). Shortly afterwards, the State submitted a one-page letter, reasserting the position it had urged on the first remand (A. 339). About two months later, the case was taken under submission; the same day, the Court of Appeal filed a brief two-page opinion again affirming the conviction (A. 341). It did this, as before, without having heard argument.

The opinion said that the Court had thoroughly reviewed and considered the record in affirming on the first remand, and that it had given further consideration to the cause in light of *Chapman* v. *California*. Without further discussion, the Court then incorporated by reference its original 1964 opinion and declared a belief, based upon "conclusive evidence" of guilt, that comment and instruction on

petitioner's failure to testify were harmless beyond a reasonable doubt (A. 341-342).

No mention was made that the court had never seen the trial exhibits, nor indeed was this any longer possible, since all trial exhibits had been removed from the files of the Superior Court during the first remand, and later destroyed in part by the district attorney (see fn. 1, p. 7, and fn. 24, p. 38, above).

ARGUMENT

Summary and Introduction

The comment and instruction on petitioner's failure to testify were error (*Griffin* v. *California* (1965) 380 U.S. 609). The question is whether—on this record—the District Court of Appeal could reasonably declare a belief that the error was harmless, beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18).

The Court of Appeal based its decision on the "conclusive evidence" of guilt (A. 342). It did not find that comment by the prosecutor was insignificant, nor could it in view of the emphasis placed upon the failure to testify during argument to the jury.

The basic issue, on all three counts, was whether petitioner was the robber. The evidence, both circumstantial and direct, was far from conclusive. First, there were numerous conflicts in the eyewitness descriptions of the robber. Second, there was testimony that a number of witnesses had been shown photographs of petitioner shortly before trial, in an apparent attempt to bolster their in-court identification. Third, there was substantial question how

far the in-court identifications rested upon independent recollections of the robber, as he appeared at the various stores, in contrast with recollections of petitioner as he appeared in the line-up or at the separate exhibition to Pauletich the night of the robbery. Fourth, there was the simple fact that petitioner had on his person only $176 at the time of his arrest, whereas the robber had obtained a total of $235-265 almost immediately before.

Other evidence indicated petitioner's innocence. There was testimony that he was gainfully employed. Several persons stated they had paid him an aggregate of about $198 in wages within a few days prior to the arrest. Also, the last robbery netted money in denominations of $20's; yet no $20's were found on petitioner.

Indeed, had the evidence in fact been conclusive, it is unlikely the prosecutor or the police would have found it expedient to show photographs of petitioner to witnesses before trial, or that the prosecutor would have elected to comment on petitioner's failure to testify on at least three different occasions during argument to the jury.

Separate and apart from comment on petitioner's failure to testify, it was error to use petitioner's silence in the face of accusations as an admission of guilt. Such accusations were not mere harmless statements, but assertions that petitioner was the robber. One was made by a police officer at the arrest, another at the line-up while petitioner was in custody and under police control. Use of petitioner's silence as evidence of guilt imposed a severe penalty on the exercise of his rights under the Fifth Amendment (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615; see also *Miranda* v. *Arizona* (1966) 384 U.S. 436, 468, fn. 37). It

allowed a conviction on proof of accusations, rather than on hard-core evidence of guilt—and for all practical purposes shifted the burden of proof.

Further, the identification procedures used by the prosecutor and the police outside court were pregnant with suggestion, and made it impossible for petitioner to have a fair trial. The circumstances did not require an individual confrontation with Pauletich (cf. *Stovall* v. *Denno* (1967) 388 U.S. 293). Nor was it consistent with due process to place petitioner in a line-up where he was the only one dressed in both a hat and coat like the robber (see *United States* v. *Wade* (1967) 388 U.S. 218, 232-233). No counsel was present to represent petitioner at these crucial stages or otherwise protect his interests. Moreover, showing photographs of petitioner to witnesses later made meaningful cross examination into their independent recollections difficult, if not impossible (see *United States* v. *Wade* (1967) 388 U.S. 218, 223-234, 235-236).

Finally, the record demonstrates that petitioner was denied the right to counsel, both at trial and on appeal following the two remands. The circumstances of these denials are discussed below (see pp. 96-108).

A.

It Was Error to Rule That Comment and Instruction on Petitioner's Failure to Testify Were Harmless Beyond a Reasonable Doubt.

Comment and instruction on petitioner's failure to testify were error (*Griffin* v. *California* (1965) 380 U.S. 609). The case was pending in this Court when *Griffin* v.

California was decided, so the error is properly in issue (*O'Connor* v. *Ohio* (1966) 385 U.S. 92). The question now is whether the State has met its burden of proving beyond a reasonable doubt that the erroneous comment and instruction did not contribute to petitioner's conviction (*Chapman* v. *California* (1967) 386 U.S. 18, 24, 25-26).

We set to one side how this issue can ever be completely resolved in the present circumstances, where the district attorney's office has removed from the files of the trial court and destroyed the clothing shown to the jury, as well as the rough diagram of the streets in West Oakland which, directly or indirectly, suggested to the jury the relative distances between the various offenses and the scene of petitioner's arrest.

We also put to one side the question of how the court below could properly have decided the harmless error issue against petitioner, when on both remands it refused to hear argument on his behalf or even to appoint counsel to marshal the facts in a brief.

What emerges from the record is that it is impossible to say—beyond a reasonable doubt—that the comments and instructions on petitioner's failure to testify did not contribute to petitioner's conviction.

The basic issue was whether petitioner was the robber. He could not take the stand to deny the charges, without risking that his prior convictions, years before, would be used for impeachment and perhaps prejudice the jury (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615). His defense was that the State had failed to prove its case, and also that the money found on his person had been earned, not stolen.

The prosecutor used the comment against petitioner in two ways. First, to support an overall inference of guilt, because he had not testified. Second, to attack petitioner's defense that he had earned his money. The prosecutor suggested that part of the sums earned may have gone to pay bills. He said that the jury could not know about this, because petitioner had failed to testify (see p. 54, above).

The comment played a prominent role in both opening and closing argument. It was the final point made in opening argument (see pp. 47-48, above). It was made twice at the end of closing argument (see pp. 53-54, above).

The failure to testify was very much before the jury, because of the court's admonitions to petitioner during his argument, warning him not to testify by discussing matters not in evidence. Even petitioner's concluding sentence, that he was not the robber, was attacked as testifying (see p. 51, above).

Further, the prosecutor relied heavily on circumstantial evidence to obtain a conviction (cf. *Fontaine* v. *California* (1968) 390 U.S. 593). The last portion of his closing argument was devoted almost entirely to a discussion of the various inferences pointing to petitioner as the robber. And in his concluding sentences he urged the jury to take all this evidence, both circumstantial and direct, into consideration in reaching a verdict (see p. 55, above).

The trial court instructed on both direct and circumstantial evidence, and likewise told the jury that it could consider all the evidence together, not just parts of it (A. 303-304). The court specifically instructed the jury that it could draw adverse inferences from petitioner's failure to testify (see p. 56, above). It coupled these instructions

with others on adverse inferences to be drawn from petitioner's failure to deny the accusations made against him, at the arrest and later at the line-up (see pp. 55-56, above). In both sets of instructions, silence was equated with guilt.

Who knows on what evidence—direct or circumstantial —or on what inferences any one or more of the jurors may have relied?

This was a case where there was latitude for doubt that petitioner was the robber. First, he was accused of three separate offenses, all occurring in different locations. Second, the prosecutor as much as admitted that all the identification testimony might not be convincing, when he argued that proof of *modus operandi* would be sufficient to link petitioner to an offense, even if the identification were not very good (see p. 53, above). But even here, the basic common denominator was merely that the robber had his right hand in his coat pocket at each of the offenses, simulating a gun—hardly a unique trait. Moreover, the clerk at the scene of petitioner's arrest was unable to recall whether petitioner had either of his hands in his coat pocket at the time he came into the store (see p. 39, above). Further, the prosecutor did not deny petitioner's statements during argument to the jury that the descriptions of the robber in the various police reports did not match the actual, physical appearance of petitioner, or even the descriptions given in court (A. 275, 279, 283-284). Instead, the prosecutor attempted to avoid the obvious inferences, by arguing that the investigating officers might not have asked about such things as mustaches or scars (see p. 52, above).

What was the "conclusive evidence" of guilt upon which the court below relied? Was it that Wong and Jow (count

one), Perry, Griffith and Jones (count two), and Pauletich (count three) all pointed to petitioner in court as the robber? Then what about the testimony of Slaise (count three), who could not identify petitioner at all, or anyone else for that matter? And what about the testimony that three of the six persons who made the identification, Jow, Griffith and Jones, had all been shown photographs of petitioner shortly before trial? How could Jow point out petitioner in court three months after the robbery, when he could not make a positive identification the next day at the line-up?

Why did Wong refuse to say for sure whether he saw any swelling on petitioner's right hand, when he examined it at the line-up—though he claimed to have struck the robber on the hand with the barrel of his .38, just the night before (see pp. 19-20, above)?

Wong and Jow both admitted they were excited at the time of the attempted robbery (see p. 6, above). This was the first time anyone had tried to hold them up (see p. 6, above). Of those who were at Perry's liquor store, Griffith said he was "afraid" (A. 165). Jones was more intent on running into the store to buy a bottle before the store closed, than he was on making an identification of the robber (see pp. 8-9, above). Perry, who testified he could never forget the robber's eyes, was unable at the same time to say whether the robber had any thick or heavy grease on his face (see p. 32, above). Moreover, he admitted that he was "hot" about having to go to the line-up, and then having to lose additional pay to come to court and testify (A. 152). As to Pauletich, he acknowledged "a little excitement" when the police brought petitioner into his store about half an hour after the robbery (A. 219). Further, he could not make up his mind about

what kind of clothes the robber was wearing, and did not notice whether the robber had a mustache, nor was he too sure about scars (see pp. 22 (fn. 11), 34, above).

The very fact that the police brought petitioner into Pauletich's store, rather than going directly to the police station, is some indication that the police themselves were not sure, from their reports, whether petitioner was the robber.

Little need be said of the so-called oral admission elicited from petitioner at the police station by the arresting officer (see p. 41, above), to the effect that petitioner said he didn't carry a gun because guns made him nervous, and that if he had one he might have killed someone that night. First, the statement was uncorroborated (see p. 41, above). Second, it had not been reduced to writing in any fashion, even though the testimony of the first witness for the State, the officer who was in charge of the investigation, showed that the police had been very careful to make notes of their conversations with the various witnesses, including a conversation with petitioner (see pp. 29-30, above). Third, the court itself instructed the jury that testimony of any such "admission" must be viewed "with caution" (A. 306). Indeed, why was the officer even questioning petitioner at all along these lines, if he was sure he had his man?

Further, the line-up was conducted in such a manner as to almost compel an identification of petitioner. He was the only person with both a hat and coat like the robber. He was the only one in the age bracket of the robber; all the others were "young guys" (see pp. 15-16, above). He was standing in the middle, where he could not be missed

(see p. 16, above). These are but a few of the suggestive circumstances of the line-up; others will be discussed later in that portion of the brief dealing with the measures used outside of court to obtain an identification (see pp. 82-90, below).

Elsewhere in this brief are set forth the numerous inconsistencies in the testimony concerning the robber's physical appearance and clothing (see pp. 33-38, above). Briefly summarized, the testimony described a robber:

(i) With a scar on the right side of his face, without a scar on the right side; with a scar on the left side variously located on the lower part of the cheek and nose, at the base of the nose—above the left corner of the lip—and right down by the jaw; a robber for whom one witness first said he did not report a scar, but who later changed his testimony and said he did report a scar; and a robber for whom another witness did not remember reporting a scar at all (pp. 33-34);

(ii) With a mustache, and without a mustache (p. 34);

(iii) With other whiskers, and without other whiskers (p. 34);

(iv) With a dark hat, with a brown hat, with a dark brown hat, with an oxford gray hat, and with a grayish hat (p. 35);

(v) With a sport-type coat, sport coat, kind of a sport coat, a coat, and a sport coat or sport jacket. In color, a dark color, dark gray, lighter than the robber's trousers, grayish and gray. One witness said the coat had a little checked pattern, another said it was striped (pp. 35-36);

(vi) With a shirt with flowers; a shirt with a little flower; a shirt with dots; a shirt that was a flower; and a shirt that two witnesses could not recall at all. In color, a yellow, or a kind of yellow shirt, yellowish color shirt, and a shirt whose color one witness did not remember and another witness did not know (p. 36); and

(vii) With trousers that most witnesses could not describe (p. 37).

Elsewhere are also set forth the various inconsistencies in identification testimony at the preliminary hearing, as compared to identification testimony at trial (see pp. 22-23, above). These conflicts, of course, were all before the jury and will not be repeated here.[29]

Petitioner, moreover, would have had to have been moving at a rapid pace to commit one attempted robbery and two actual robberies, at stores blocks apart, all within half an hour or so. Had he committed them it is unlikely that he would have been found with only the odd figure of $176 in his pockets shortly thereafter, as compared to the aggregate of $235-265 taken in the robberies. To be sure, he had

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[29] Even where there are no conflicts in identification testimony, a just result is not guaranteed. See, for example, the observations of Justice Frankfurter:

> "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure" (Frankfurter, The Case of Sacco and Vanzetti (1927), p. 30).

See also Wall, Eye-Witness Identification in Criminal Cases (1965), pages 11-12.

31 one-dollar bills in his possession, and about 30-40 one-dollar bills had been taken from Pauletich. But Pauletich had also lost money in denominations of $20's, and petitioner had no $20's. Further, contrary to the prosecutor's assertions that most or all the money was crumpled up in petitioner's pockets, there was no evidence as to how much money he had carried in his pockets, as compared with his wallet, or in what denominations they were. Petitioner's argument indicated they were probably one-dollar bills, so that he could "fish" a dollar bill out of his pocket when buying drinks, rather than exposing the rest of his money (A. 290).

In short, the evidence was far from conclusive that petitioner was the robber. The Court of Appeal for that reason erred in holding the error harmless (cf. *Chapman* v. *California* (1967) 386 U.S. 18; *Fontaine* v. *California* (1968) 390 U.S. 593).

In any event, how can this Court, or any appellate court, ever say—beyond a reasonable doubt—that comment on the failure to testify was harmless and did not contribute to a conviction? How can it see the reaction of the jurors when the comment was made? How can it know the tone of voice in which the prosecutor spoke of the failure to testify, or the pauses used by him for emphasis, or the emphasis the judge placed upon the comment in reading his instructions?

Further, the harmless error rule assumes that the jury has to believe all the other evidence adduced against an accused, whereas in fact its very purpose is to judge demeanor of the witnesses and their apparent veracity in testifying, and then to reject such testimony as may seem unconvincing or untrue. How can this Court, or any court,

know on appeal if the jury believed little of the direct evidence, and instead relied almost entirely on the inferences, from the failure to testify? The answer is, it cannot.

Moreover, comment always goes to the very heart of the trial—guilt or innocence. It is not a mere procedural error, that can be corrected easily or that is fundamentally irrelevant.

In other cases this Court has been unwilling to speculate on what may or may not have contributed to a conviction, where error of constitutional magnitude was involved (e.g., *Gideon* v. *Wainwright* (1963) 372 U.S. 335 (denial of counsel); *Lynumn* v. *Illinois* (1963) 372 U.S. 528 (involuntary confession); *Haynes* v. *Washington* (1963) 373 U.S. 503 (involuntary confession); and *Tumey* v. *Ohio* (1927) 273 U.S. 510 (financial interest of judge in result)), or even where there was a possibility of influence from outside, improper sources (e.g., *Rideau* v. *Louisiana* (1963) 373 U.S. 723 (admissions on television interview); *Turner* v. *Louisiana* (1965) 379 U.S. 466 (close and continuous association between key witnesses and the jury)).

We do not suggest, however, that petitioner needs a *per se* rule to obtain a reversal on the comment and instructions. The record here shows that it was impossible to declare that the error was harmless, beyond a reasonable doubt, and that the Court of Appeals erred in ruling otherwise. We do suggest, though, that a *per se* rule would not be inappropriate in *Griffin*-type comment cases, because of the inherent difficulty in saying in any circumstances that comment did not contribute to a conviction.

If the comment was unimportant, why did the prosecutor make it?

B.

It Was Error to Use Petitioner's Silence in the Face of Accusations by a Police Officer at the Arrest, and Later by a Viewer at the Line-Up, as "Adoptive Admissions" of Guilt.

Immediately before petitioner was arrested, the arresting officer said to the clerk on duty in the liquor store that there had been some robberies (A. 228). He then said to petitioner, "Buddy, you fit the description," and began to search him (A. 228, 233). Petitioner remained silent (A. 228, 233). This silence was used against petitioner at trial as an "adoptive admission" of guilt (A. 237-238, 298-299).

While petitioner was in custody, at the line-up, a police inspector took one of the viewers out into the line-up corridor, so that the viewer could point to the man he had picked out (A. 131-132). The viewer was Perry, the clerk at the second liquor store (count two). He testified that he went up to petitioner and said, "that was the man that held me up" (A. 132). He testified that petitioner remained silent (A. 132). The accusation was made in the immediate presence of the police inspector (A. 131-132). Here too, silence was used at trial as an "adoptive admission" of guilt (A. 298-299).

The State elicited testimony of both accusations during its case in chief. Each time the court asked a number of questions about petitioner's conduct, to establish that he had in fact heard the accusations and remained silent (A. 131-132, 228, 232-233).

During closing argument, the prosecutor referred specifically to the accusations and described them in detail

(A. 298-299). He said that petitioners' silence was circumstantial evidence of guilt, which the jury could consider in reaching a verdict (A. 298-299). These comments were made near the end of his closing argument, as one of his final points (A. 298-299). Shortly thereafter, the court gave instructions on "adoptive admissions." It told the jury, in effect, that silence in the face of accusations was proof of guilt (see pp. 55-56, above).

On appeal, the court below rejected the argument that petitioner might well have failed to deny the arresting officer's accusations out of fear of his authority, or out of ignorance of the robberies. It said these contentions were entirely without merit, and held that the instructions on admissions by silence were proper (A. 231).

While this case was pending here on the initial petition for certiorari, and before the first remand, the California Supreme Court held in two other cases that use of such admissions as evidence of guilt was proscribed by the rationale of *Griffin* v. *California* (1965) 380 U.S. 609, as a violation of the Fifth Amendment privilege against self-incrimination (*People* v. *Cockrell* (1965) 63 Cal.2d 659, 669-670, certiorari denied (1967) 389 U.S. 1006; *People* v. *Ridley* (1965) 63 Cal.2d 671, 673, 674-676). However, it applied a harmless error rule to comment and instruction on such admissions, in one case holding the error harmless in view of the "abundant evidence" of guilt (*People* v. *Cockrell* (1965) 63 Cal.2d 659, 671, certiorari denied (1967) 389 U.S. 1006), in another harmful (*People* v. *Ridley* (1965) 63 Cal.2d 671, 676-677).

The use of adoptive admissions was raised by petitioner in this Court on his initial petition for certiorari (Motion for Leave to File a Reply to Respondent Petition in Opposition to Petitioner Petition for a Writ of Certiorari, p. 2)

and was before the Court when it remanded the case the first time to the District Court of Appeal for further proceedings in light of *Griffin* v. *California*. On remand, however, the Court of Appeal did not discuss the admissions, though presumably it knew of the opinions of the California Supreme Court in *Cockrell* and *Ridley*. Instead, the court below said that its first opinion set forth its reasons for rejecting the various claims of error raised by petitioner, and that no valid reason had been advanced to bring it to a different conclusion. It adopted its prior opinion in full. As to the comment and instruction on failure to testify, it held that the error was harmless because of the "abundant evidence" of petitioner's guilt, noting that there had been identifications by six eyewitnesses and asserting that petitioner had "produced no evidence contradictory of the eyewitnesses' testimony" (A. 333). The court, by summarily incorporating its prior opinion, ruled in effect that *Griffin* did not extend to the use of adoptive admissions in this case, or, if it did, the error in using adoptive admissions as evidence of guilt was harmless, within the harmless error standard then prevailing.

When this Court remanded a second time, for reconsideration of the finding of harmless error in light of *Chapman* v. *California* (1967) 386 U.S. 18, the District Court of Appeal said that it had thoroughly reviewed and considered the record on the first remand, on *Griffin*. It said that it had given further consideration to the cause in light of *Chapman*, and that it approved and adopted again its first opinion affirming the conviction. As to comment and instruction on the failure to testify, it declared a belief that the error was harmless beyond a reasonable doubt, because of the "conclusive evidence" of guilt (A. 342).

Again it did not mention the adoptive admissions, although they were part of the prior opinion which it adopted and incorporated by reference. Such treatment of the admissions meant that the court below again concluded either that the use of adoptive admissions in the context of this case was not error, or that the error, if any, was harmless under the new standard of *Chapman.*

When petitioner sought certiorari this last time, he once more raised the question of the propriety of comment and instruction to the jury on admissions by silence (Petitioner Supplement Brief to the Application for a Writ of Certiorari, p. 6). So the issue is now properly before the Court.

Was it error to use petitioner's silence, in the face of accusations, as evidence of guilt?

Griffin v. *California* (1965) 380 U.S. 609 holds that the Fifth Amendment, in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence at trial, or instructions by the court that such silence is evidence of guilt (*id.,* at p. 615).

The same rule should be applied to comment and instruction on the accused's silence before trial, at arrest and while in custody. First, an accused has a privilege to remain silent at these stages (*Malloy* v. *Hogan* (1964) 378 U.S. 1, 8; *Escobedo* v. *Illinois* (1964) 378 U.S. 478, 485). Second, comment and instruction on his silence cut down the privilege, and make its assertion costly (*Griffin* v. *California* (1965) 380 U.S. 609, 614). Third, courts may not impose a penalty upon an accused for exercising a constitutional privilege (*Griffin* v. *California, supra,* at p. 614). For these reasons, it follows that the Fifth Amendment,

made applicable to the States through the Fourteenth Amendment, forbids drawing inferences of guilt from silence in the face of accusatory statements (cf. *Miranda* v. *Arizona* (1966) 384 U.S. 436, 468, fn. 37; see also *McCarthy* v. *United States* (6 Cir. 1928) 25 F.2d 298, 299).

Silence, of course, is an unequivocal exercise of the privilege (*Griffin* v. *California* (1965) 380 U.S. 609; see also *United States* v. *Pearson* (6 Cir. 1965) 344 F.2d 430, 431; *Helton* v. *United States* (5 Cir. 1955) 221 F.2d 338, 342; *People* v. *Cockrell* (1965) 63 Cal.2d 659, 670, certiorari denied (1967) 389 U.S. 1006).

Sound practical reasons suggest themselves for such a rule. First, the accused has no control over the scope or content of the accusation, and unless he wants to waive the privilege cannot limit or explain what he means by his silence. Second, the inference is not one the jury would itself draw from what it observes in court, but is one that is generated outside court by the police or others, perhaps solely because they fear they will be unable to prove their case by direct evidence at trial. Third, silence may occur for a number of reasons unconnected with an admission of guilt. The accused, for example, may be innocent and unable to understand what the accuser is talking about. Or he may be timid or afraid and unable to answer for emotional reasons. Or he may be wary of saying anything at all, lest whatever he says be twisted and used against him (see, e.g., *Helton* v. *United States* (5 Cir. 1955) 221 F.2d 338, 342).

Such rule, forbidding the use of inferences against an accused because of a failure to deny accusations, should be applied in the present case. Here admissions by silence were clearly used against petitioner (see pp. 71-72, above). Further, the accusations were made at a time when the

privilege against self-incrimination had already attached. Use of petitioner's silence as an "adoptive admission" imposed a severe penalty on the exercise of the privilege. It was a penalty the jury could not have missed, because the court and prosecutor repeatedly drove home the making of the accusations and the fact of petitioner's silence (see pp. 71-72, above).

Further, the error requires reversal of the judgment below on all three counts. First, the accusation by the police officer was a reference to a number of robberies, which the jury may well have interpreted to include the attempted robbery of Wong, as well as the robberies of Perry and Pauletich. Second, under the prosecutor's *modus operandi* arguments, the accusation on count two (by Perry) could also have been considered by the jury on counts one and three (A. 270, 298).[30]

Moreover, it cannot be said the error was harmless. It went to identification, the basic issue in the case. Substantial conflicts existed in the identification testimony and in the descriptions of the person or persons who committed the offenses charged to petitioner (see pp. 32-38, above). Further, whatever inferences the jury, on its own, might or might not have drawn from the failure to testify absent comment and instructions (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615), it would not have known

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[30] During closing argument, he said:

"*If you had a case,* for example, *where* you are satisfied that one identification of the person is good identification, *the other identification may not be very good, but you are satisfied that each of the offenses were committed in exactly the same way, you could reasonably make an inference that the same person,* if you are satisfied committed one of the offenses, *committed the other ones, too*" (A. 298).

about the accusations had not the prosecutor deliberately elicited testimony about them. The eliciting of such testimony is some indication, in itself, that the prosecutor believed the "admissions" would assist in obtaining a conviction. Such conduct also indicates the prosecutor may have believed the eye-witness identifications were not entirely persuasive. On the record in this case, it is impossible to declare a belief that comment and instruction on petitioner's silence, in the face of the accusations, were harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18; see also *McCarthy* v. *United States* (6 Cir. 1928) 25 F.2d 298, 299).

In any event, it is legitimate to question the use of a harmless error rule at all in the case of "adoptive admissions." The "admissions" are little more than involuntary confessions (cf. *Bram* v. *United States* (1897) 168 U.S. 532, 562-563; *Boyd* v. *United States* (1886) 116 U.S. 616, 621-622; see also Developments in the Law—Confessions, 79 Harv.L.Rev. 938, 1041-1044 (1966)). They are compelled by the accusation just as surely as if they were compelled by a rubber hose. Harmless error rules have not been applied in the past by this Court to involuntary confessions (e.g., *Jackson* v. *Denno* (1964) 378 U.S. 368, 376; *Haynes* v. *Washington* (1963) 373 U.S. 503, 518-520; *Lynumn* v. *Illinois* (1963) 372 U.S. 528, 536-538). They should not now be applied to involuntary admissions by silence (cf. concurring opinion of Mr. Justice Stewart in *Chapman* v. *California* (1967) 386 U.S. 18, 42-45).

Finally, by using adoptive admissions, the prosecutor is, in fact, shifting the burden of proof. He is proving his case, at least in part, by accusations, rather than by hard-core direct or circumstantial evidence of complicity. He is

placing upon the defendant the burden of explaining his silence, or risking a conviction. The accusation itself becomes the evidence against the accused. But this is contrary to the constitutionally compelled duty of the prosecutor to establish guilt by evidence independently and freely obtained (*Malloy* v. *Hogan* (1964) 378 U.S. 1, 7-8). It permits a conviction not on proof of what was done, but on what the defendant is accused of doing. And, in practicality, denies an accused a fair trial. Like an inquisition, the accused stands condemned by his silence.

C.

The Line-Up and Other Identification Procedures Used by the Police and District Attorney, Outside Court, Were Unduly Suggestive. Separately and Collectively They Denied Petitioner a Fair Trial.

Three separate procedures were used by the police or district attorney, outside of court, to obtain an identification of petitioner. They were:

(1) Showing petitioner singly to Pauletich, in Pauletich's liquor store, the night of the robbery (the show-up);

(2) Showing petitioner in a group to Wong, Jow, Perry, Griffith and Jones at the Oakland jail, the next day (the line-up); and

(3) Showing photographs of petitioner to Jow, Griffith and Jones individually, shortly before trial.

The show-up, the line-up and the showing of photographs, in the circumstances of this case, were unduly suggestive.

(1) The Show-Up

The showing of petitioner singly to Pauletich is described earlier in the brief (see pp. 13-14, above).

Pauletich testified, on direct examination, that he made an identification of petitioner at the show-up. This was admissible in California not only to corroborate the identification made at trial, but as independent evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626). Later, one of the prosecutor's principal identification arguments to the jury was that Pauletich had identified petitioner within half an hour after the robbery, at the show-up (A. 269).

The show-up was conducted in an atmosphere of excitement (A. 219). The police in effect told Pauletich that petitioner was the robber, when the two officers walked into the store on either side of petitioner, holding him by the hands (A. 199). The police did not require that Pauletich study petitioner carefully for any period of time; the whole procedure was over in just a moment or so (A. 200). Further, the police did not make petitioner remove his hat and coat, so that Pauletich could not be confused by clothing similar to that worn by the robber (A. 194, 200-201, 219).

The show-up epitomized almost every feature that has led to the near universal condemnation of such procedures as an unduly suggestive and near totally prejudicial means of producing an identification (Frankfurter, The Case of Sacco and Vanzetti (1927) pp. 31-32; Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 27-40; see also *Stovall* v. *Denno* (1967) 388 U.S. 293, 302). It showed petitioner, a man of a different race, to Pauletich late at night under circumstances that offered Pauletich no alternative choices, by which he could test his independent

recollection. Had Pauletich any emotional reaction to the robbery shortly before, he would have been predisposed to believe the worst of the person brought before him as the probable offender (Borchard, Convicting the Innocent (1932) p. 84). Moreover, the show-up was a wholly unnecessary procedure, since Pauletich was not incapacitated in any way, or otherwise in need of making an immediate identification (compare *Stovall* v. *Denno* (1967) 388 U.S. 293, 302).

But more importantly, the show-up produced an identification of a man who did not fit the description of the robber Pauletich had given the investigating officer minutes before. Pauletich had told the officer the robber was about 5'8" tall, and 150 pounds (A. 195). Petitioner, on the other hand, was 5'10" to 5'10½" tall, and weighed 178 to 180 pounds (D.X. A, A. 91; A. 275). Further, the investigating officer's on-the-scene handwritten report, prepared after talking with Pauletich, did not list any mustache, whiskers or scar for the robber (P.X. 13 for identification, A. 38), yet petitioner had all three (D.X. A, A. 91).

Despite these inconsistencies, Pauletich adhered throughout cross examination to his identification of petitioner at the show-up. Moreover, he went out of his way on two separate occasions to justify his identification of petitioner, by volunteering on direct examination and later on cross examination some extremely damaging conclusionary and hearsay commentaries, respectively, to demonstrate his belief petitioner was the robber (these comments are briefly set out at pp. 31-32, above). Pauletich, perhaps, illustrates the statement that:

> "Psychologically, the individual who is careless in his observations and weak in memory may often be

> the type of person who makes snap judgments and in whom such qualities as 'pride and stubbornness, make for confirmation of the original identification rather than for open-minded reconsideration' [citing Borchard, Convicting the Innocent (1932), p. 261]" (Wall, Eye-Witness Identification in Criminal Cases (1965) p. 15).

In any event, the facts in this case demonstrate that the confrontation with Pauletich at the show-up was so unnecessarily suggestive and conducive to irreparable mistaken identification that use of Pauletich's identification testimony at trial denied petitioner due process of law (*Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since Pauletich's identification may well have tainted the convictions on the other counts, in view of the prosecutor's *modus operandi* arguments (see p. 76, fn. 30, above), the convictions on all three counts must be reversed and the case remanded for a new trial (*Gilbert* v. *California* (1967) 388 U.S. 263).

Nearly seven years have now passed since the robbery and show-up. Given the difficulties normally incident to making an accurate identification during a time of stress, such as a robbery, the extremely suggestive nature of the show-up and the ordinary human fallibility of dimming recollections with passage of time, it would now be impossible to hold a meaningful hearing to determine whether Pauletich could somehow unscramble his recollections for purposes of giving identification testimony at a future trial (for a discussion of the problem, see generally, Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 5-25).

Justice to petitioner, therefore, requires that any identification testimony by Pauletich be excluded if this case is again brought to trial (cf. *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274; see also *United States* v. *Wade* (1967) 388 U.S. 218, 235-236). Since petitioner was not the instigator of the show-up, he should not now be made to bear the burden of its error.

Better than anything else, this case illustrates the dangers inherent in a show-up where counsel is not present to represent the accused (see *Stovall* v. *Denno* (1967) 388 U.S. 293; see also *United States* v. *Wade* (1967) 388 U.S. 218; *Gilbert* v. *California* (1967) 388 U.S. 263).

(2) The Line-Up

The showing of petitioner in a line-up to Wong, Jow, Perry, Griffith and Jones is described earlier in the brief (see pp. 14-20, above).

Wong and Perry, on direct examination, each testified that he had identified petitioner in the line-up. This testimony was admissible not only to corroborate their in-court identifications, but also as separate, direct evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626).

Jow, Griffith and Jones, on cross examination, each acknowledged he too had seen petitioner before, at the line-up, and in one degree or another had made an identification. This also became separate evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626; see *United States* v. *Wade* (1967) 388 U.S. 218, 240-241, for an explanation of the dilemma confronting petitioner in attempting such cross examination).

The prosecutor later argued that the line-up identifications showed petitioner was the robber (A. 269-270), and

made irrelevant questions of whether the various witnesses were shown photographs or otherwise coached before trial (A. 294-295, 296).

The line-up was conducted in an atmosphere of hostility, where one witness was plainly "hot" for having to be there, and who had come only because he thought the police wanted him to see if he could identify the man who held him up (A. 152, 158-159). This was Perry. He communicated his impatience by his comments in the elevator, by being first to the window, and by then going out into the corridor shortly thereafter, to point to petitioner and accuse him of being the robber, in view if not in hearing of one of the other witnesses (Griffith).

Moreover, the police left little room for doubt that the line-up contained a suspect. They said as much to Perry, and also to Wong, in asking them to come down to the jail. And at the line-up, the instructions to all were "to look straight through [the window] *and see if we could see the suspect*" (emphasis added) (A. 138).

The line-up showed petitioner in circumstances where he could not be missed. He was standing in the middle, or number 3 position, across from the window (D.X. B, A. 106; A. 69, 140). Unlike those on either side of him, he was the only one dressed like the robber, in sport coat and hat. And he was the only one in the age group of the robber—unlike all the others who were "young guys" (A. 171).

No effort was made to assure the witnesses were identifying the actual robber, rather than just the clothing worn by petitioner. The police did not require any of the other persons shown to be dressed in clothing similar to

petitioner, nor did they require that petitioner exhibit himself without coat and hat. Instead, they emphasized the disparities in his clothing by having petitioner put on his hat at least three times, for the benefit of Wong, Griffith and Jones (see pp. 16-18, above).

With petitioner's singular clothing and difference in age, it is not surprising that Wong could not recall how many persons in the line-up had mustaches or beards (A. 93); or that Griffith did not pay any attention to whether anybody else in the line-up had a scar, and looked at nobody but petitioner (A. 172). For as Griffith said:

> "Didn't nobody have their coat on like that one but you. Ain't nobody else have their coat on because them other guys was young guys" (A. 171).

Further, the police made little effort to assure that each witness would be able to view the line-up free from the influence of the others. All were walked over to jail in a group (A. 168-169). At least some of them heard Perry's comment in the elevator, that if he "saw the guy again in the next hundred years," he would be able to identify him (A. 151-152, 169). And all were gathered together in a small room, where one by one, in front of each other, they were called to the window to look out into the corridor, and make an identification (see pp. 15-19, above).

Despite the "no talking" rule, the inspector himself and each of the witnesses talked as they stood at the window; and later, as Jones said, "[W]e was all talking together" (A. 185). Jones, in fact, said he remembered telling someone petitioner "looked like" the robber, but did not know who the man was or if he was a police officer (A. 186).

Moreover, Jow was aware that "two of the boys" had gone out into the corridor to make an identification (A. 121). And Griffith said he saw "two guys" go up and put their hands on petitioner, while he was looking through the window (A. 169).

Here the line-up incorporated nearly every suggestive feature described and, by implication, condemned in *United States* v. *Wade* (1967) 388 U.S. 218, 232-234). It showed petitioner in a line-up where he was the only person dressed in clothing allegedly worn by the robber; it showed him in the middle of the line-up, where he could not be missed by anyone looking "straight" through the glass (D.X. B, A. 106; A. 139); and it showed him as the only person in the age group of the robber. Moreover, it showed him under circumstances where the police had already indicated that someone in the line-up had committed the offenses (compare Identification Parades, Part I, (1963) Crim.L.Rev. 479, 483). Further, it allowed each of the witnesses ample opportunity to be influenced by the others, first, by the group walk over to the jail, and second, by the massing of witnesses in a small room, and third, by the lax enforcement of a "no talking" rule (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 46-51; Identification Parades, Part I, (1963) Crim.L.Rev. 479, 486).

But more importantly, as in the case of the show-up, the line-up produced an identification of a man who did not fit the descriptions of the robber, as set forth in the on-the-scene police reports prepared the night before (P.X. 9 for identification, A. 37; P.X. 11 for identification, A. 37).

The report for the attempted robbery of Wong described a robber with a medium build, 5'6" tall, weighing 150-160

pounds. Yet petitioner was considerably larger, at 5'10"-5'10½" tall, and 178-180 pounds (D.X. A, A. 91; A. 275). Further, the report did not mention a mustache, whiskers or scar, but petitioner had all three (P.X. 9 for identification, A. 37; D.X. A, A. 91).

The report for the robbery of Perry listed a "small scar left side of mouth" for the robber, as contrasted with the large, pronounced scar above petitioner's lip. Further, it described a robber with a husky build, 5'9", 180 pounds, and "nervous," yet in court Perry said petitioner, as the robber, was "cool" (A. 138-139). The report did not list a mustache or whiskers, yet petitioner had both (D.X. A, A. 91). And it described the robber's hat as "brown," but petitioner's hat was black (D.X. 11 for identification, A. 37; A. 205, 282-283, 293-294).

There were other disparities as well. When Wong examined the back of petitioner's hand at the line-up, he saw a dark spot, but apparently could not see any swelling (A. 74). Yet he had brought down his .38 on the pocket of the robber less than 12 hours before. And, as he said at the preliminary hearing, he did not know whether he had caused the dark spot, or not (Tr., Preliminary Hearing, p. 19). Further, even though Perry had looked the robber straight in the face, to familiarize himself with it, he did not remember any hair on the robber's lower lip, or reporting a mustache to the police (Tr., Preliminary Hearing, p. 33; A. 134, 142, 159). Yet he pointed to a man in the line-up who not only had such hair, but a mustache as well (D.X. A, A. 91).

Despite these inconsistencies, Wong, Perry, Griffith and Jones adhered throughout cross examination to their iden-

tification of petitioner at the line-up. Jow, although not too sure of an identification at the line-up, attempted to excuse this circumstance by referring to a glare on the window (A. 116, 121). Perry, moreover, became hostile as questioning progressed, and at one point (in front of the jury) accused petitioner of "trying to play * * * dumb," for seeking answers about the robber (A. 139). Griffith, unlike the other witnesses, refused to answer most of petitioner's questions about the robber, except in the second person (A. 164-177; see p. 32, above for another brief discussion of this testimony). Perry, Griffith and the rest, perhaps, illustrate the statement that:

> "It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined then and there, before the trial" (Identification Parades, Part I, (1963) Crim.L.Rev. 479, 482).

The line-up was one of the most crucial events in the entire case, since it committed each of the viewers, including Jow, to a decision on the basic issue in dispute, namely, the identity of the robber. In the totality of the circumstances in which it occurred, the line-up was so unnecessarily suggestive and so conducive to irreparable mistaken identification, that use of testimony based upon the line-up as evidence of guilt was a denial of due process of law (*Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since this testimony could also have tainted the conviction on count

three, in view of the *modus operandi* arguments, the convictions on all three counts must be reversed and the case remanded for a new trial (cf. *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274).

There is no way now to determine, in any meaningful sense, whether the in-court identifications of petitioner at trial had an independent source (cf. *United States* v. *Wade* (1967) 388 U.S. 218, 241-242; *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274). Within three months of the line-up, at trial, the witnesses themselves could not recall all that had occurred. Perry, for example, could not remember what any of the others in the line-up looked like (A. 139-140); Jow said he was bothered by the glass (A. 121); Griffith could not remember fully what he told the inspector (A. 170); and Jones did not recall whether he talked to the inspector or someone else, in making an identification (A. 185-186).

Wong, perhaps, best illustrates the problem. He said at the preliminary hearing that some of the persons in the line-up had hats, but others did not (A. 72; Tr., Preliminary Hearing, p. 15); at trial, on direct examination, that all had hats (A. 60); and, on cross examination, that he did not pay much attention to, or remember, how many of the others had hats (A. 70, 89). When Jones said he saw others with hats, the trial court would not permit cross examination, on the ground the number of hats was immaterial (A. 186). Yet the official police line-up photograph showed that petitioner was the only one holding a hat (D.X. B, A. 106). And Griffith, contradicting Wong and Jones, said petitioner was the only one he saw with a hat on (A. 171).

Given the relatively short time each of the line-up witnesses, including Perry, had to see the robber (see pp. 5-9, above), the excitement of Wong and Jow (see p. 6, above), the confusion in Perry's liquor store with Griffith backing out and Jones running in (see p. 8, above), the wide discrepancies between the pre-lineup descriptions of the robber and the actual physical appearance of petitioner, and the irreconcilable differences in the testimony describing the robber at trial (see pp. 32-38, above), the Court should not now require petitioner to run the gamut of a hearing on independent source (*United States* v. *Wade* (1967) 388 U.S. 218, 241-242). For it is impossible to say, in the context of this case, how much of the testimony of the line-up witnesses was the product of their own recollections, and how much was the product of influences by the other participants, or of the inherently suggestive procedures used by the police.

Further, with the inevitable dimming of recollections through passage of time, it would be unrealistic to expect any of the line-up witnesses now to be able to reconstruct his memory of the robber, to a degree sufficient to meet minimum standards of fairness to petitioner. On any retrial, petitioner should not be forced to speculate how far the suggestive line-up identification nearly seven years ago has now poisoned the minds of the witnesses. Nor should he be forced to speculate how far these witnesses could set aside their prior in-court testimony and identifications, so as to approach a new trial free of prior commitment (cf. *United States* v. *Wade* (1967) 388 U.S. 218, 235-236, 240). On any retrial, therefore, all identification testimony by those who viewed the line-up should be excluded. Petitioner has already paid the price for the

tainted line-up once; he should not be made to pay it again.[31]

(3) The Photographs of Petitioner

The showing of photographs of petitioner to witnesses, shortly before trial, is described earlier in the brief (see pp. 23-26, above).

The police line-up notes included the following comments:

> "Wit. Jow—Picks #3—not too sure.
>
> "Wit. Griffith, Geo.—Picks #3 as looking like the man, not too positive.
>
> "Wit. Jones, Robt.—Picks #3—'That's the man.' Saw him without the hat—After he saw him with hat on he was positive—" (P.X. 3 for identification, A. 35).

Following the line-up (May 5th) was the preliminary hearing (May 16th), and the arraignment (June 11th). Two months then went by. In mid-July, before trial, the police delivered photographs of petitioner to Jow, along with a subpoena to testify. About the same time, the district attorney's office called in Griffith and Jones, and at separate meetings members of the district attorney's staff showed each of them a photograph of petitioner.

Later, at trial, Jow was a principal identification witness on count one (attempted robbery of Wong); Grif-

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[31] Were the line-up cases to be applied retroactively, of course, there would be no doubt that petitioner would be entitled to a reversal on all three counts, since he was not represented by counsel either at the show-up (cf. *Stovall* v. *Denno* (1967) 388 U.S. 293) or at the line-up (see *Gilbert* v. *California* (1967) 388 U.S. 263; *United States* v. *Wade* (1967) 388 U.S. 218).

fith and Jones were two of the three identification witnesses on count two (robbery of Perry).

Jow said the photographs refreshed his memory of petitioner and made him sure he was looking at the robber (A. 118, 122). Griffith denied the picture he saw refreshed his memory of the robber, but admitted it refreshed his memory of petitioner (A. 174). Jones said he recognized petitioner in the photograph as the same person he had seen in the line-up, but denied the photograph refreshed his memory of petitioner (A. 186-187).

Jow saw front and side view "mug" shots. They showed petitioner bare headed, as he would appear in court. They showed a mustache, whiskers under the lower lip, what appeared to be a scar on the right cheek, and a plainly visible scar running outward from the left upper lip (D.X. A, A. 91). The on-the-scene police report, however, prepared the night of the attempted robbery from the collective descriptions of Wong and Jow, did not make any reference to a mustache, whiskers or scar (P.X. 9 for identification, A. 37). Yet Jow, shortly after being shown the photographs of petitioner, testified at trial that the robber had a "little" mustache (A. 113), a "little" whiskers (A. 113), and a scar (A. 112-114).

The record does not disclose what photographs were shown to Griffith and Jones. On the night of the robbery, Griffith did not pay attention to a mustache or lip whiskers, but saw only a scar (see pp. 33-34, above). Yet, when shown a photograph of petitioner, he did not notice or pay attention to scars but instead "just looked at the face" (A. 173). Jones, on the other hand, saw a scar in the photograph, but none on the robber (A. 180, 185). De-

spite these incongruities, both Griffith and Jones later testified to an identification of petitioner at trial.

No counsel was present to represent petitioner when the police officer showed the photographs to Jow (A. 122). Nor does the transcript show that counsel was present when photographs were shown to Griffith and Jones (A. 172-174, 181, 184-185, 186-189). Yet these events occurred after arraignment, when it was clear petitioner had been represented at that time, at least, by the public defender (Clerk's Transcript on Appeal, p. 4).

Petitioner, of course, was not present at the showing of photographs, because he was in jail (Tr. 26, 532, 539, 638).

Nor, indeed, was any mention made of the photographs by Jow, Griffith or Jones on direct examination, when each gave his description of the robber. And when each revealed seeing the photographs on cross examination, petitioner was then in the predicament described in *United States* v. *Wade* (1967) 388 U.S. 218, 240-241—of dwelling on their identifications, by probing in the dark on the use of the photographs.

There was no justification for the showing of photographs to Jow, Griffith and Jones. It was unnecessary in terms of an immediate need for identification, since petitioner was already in custody and bound over for trial (cf. *Simmons* v. *United States* (1968) 390 U.S. 377, 384-386; *Stovall* v. *Denno* (1967) 388 U.S. 293, 302). Moreover, there was every likelihood that this procedure would lead to an irreparable misidentification:

First, the photographs were shown nearly two and one-half months after the events in question, when memories no longer were fresh;

Second, they were shown to one witness, Jow, who had been "excited" at the time of the offense, and who had collaborated on a description which, at least as written down by the investigating officer, did not fit the description of petitioner (see pp. 6-7, 85-86, above); to another, Griffith, who had been "afraid" and who had run out of the store when he heard the robber say "I am not kidding" (A. 165; s[illegible] p. 8, above); and to still another witness, Jones, who had but a "slight look" at the robber for "just a short period of time" (A. 181); and

Third, the photographs were shown under pressure, with the service of a subpoena to Jow, and during a meeting with Griffith and Jones after they had been called to the district attorney's office. It was apparent to all three that they would soon be called upon to testify, and that the authorities believed petitioner was the robber, and were depending in some degree upon them to so testify, in court.

It is no answer to say, as did the prosecutor at trial, that any attorney will want to talk with his witnesses (A. 295). It is one thing for a prosecutor to talk with witnesses before trial; it is quite another to show photographs of an accused, just before trial, to witnesses who may have been unable, for whatever reason, to make a positive identification at a prior line-up. Or to a witness, such as Jones, who appeared to rest his identification, in part,

upon clothing rather than the physical appearance of the accused.

What purpose was there in showing the photographs, other than to refresh recollections and promote in-court identifications? But this is little better than knowingly obtaining tainted evidence (cf. *Miller* v. *Pate* (1967) 386 U.S. 1), for showing the photographs could only have left a direct, fresh image of petitioner in the minds of the viewers, thereby diluting to some extent their individual recollections of the man they saw the night of the crimes (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 68-72). Yet such individual, unstructured recollections were crucial if cross examination were to have any meaning (see *United States* v. *Wade* (1967) 388 U.S. 218, 240-241).

Even more than a line-up, the showing of photographs was coupled with extreme hazards to the accused. For as has been said:

> "In considering the effect which the use of photographs may have upon the reliability of an identification, * * * the first [principle] is that where a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party, but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say, 'That's the man that did it,' what he may actually mean is, 'That's the man whose photograph I identified.' Sir Richard Muir, one of the greatest English prosecutors of modern times, was always con-

cerned about the reliability of such identifications, believing that 'however honest a witness might be, he could not shut out from his mind the features of the man he had seen in the photograph.' The witness's inability to do so is not at all surprising, since the corporeal identification is always closer (and often much closer) in time to the photographic identification than it is to the crime, and since the witness usually studies the photographs far more carefully and for a longer period of time than he was able to study the features of the perpetrator of the crime" (Wall, Eye-Witness Identification in Criminal Cases (1965) p. 68).

In any event, taking the police notes at their face value, the showing of photographs to Jow, Griffith and Jones was so unnecessarily suggestive and so conducive to an irreparable mistaken identification that use of their identification testimony later at trial denied petitioner due process of law (see *Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since this testimony on counts one and two may well have tainted the conviction of count three, in view of the prosecutor's *modus operandi* arguments, the convictions on all three counts must be reversed, and the case be remanded for retrial (*Gilbert* v. *California* (1967) 388 U.S. 263).

Moreover, the showing of photographs in the absence of counsel was, by itself, a denial of petitioner's rights under the Sixth Amendment, to be represented at each and every critical stage of the proceedings (*Gilbert* v. *California* (1967) 388 U.S. 263; *United States* v. *Wade* (1967) 388 U.S. 218). Indeed, in many respects, the display of photographs was little more than an aggravated form of

"show-up" (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 74-77).

Finally, for the same reasons that the identification testimony of the other line-up witnesses must be excluded from any future trial of petitioner, so, particularly, must the identification testimony of Jow, Griffith and Jones, because of the overlapping and, for all practical purposes, immeasurable taint that resulted from the showing of photographs. It would be unreasonable to suppose that now, nearly seven years later there could be any meaningful unscrambling of the recollections of the robber, from recollections of the line-up and showing of photographs. In short, because it is now impossible to measure the taint of the use of photographs, the State, not petitioner, should be made to bear the burden of their use.

D.

Petitioner Was Denied the Right to Counsel at Trial, When the Court Required Him to Go to Trial Without Counsel, After He Refused to Accept Further Representation by the Public Defender's Office. Petitioner Was Also Denied Counsel on Appeal, When the Appellate Court Refused to Appoint Counsel to Brief or Argue Petitioner's Case on the Two Remands.

Petitioner was denied counsel both at trial and on appeal, following the two remands. In each instance, the refusal to appoint counsel was a violation of petitioner's rights under the Sixth Amendment, in its bearing upon the State through the Fourteenth Amendment (*Gideon* v. *Wainwright* (1963) 372 U.S. 335; *Douglas* v. *California* (1963) 372 U.S. 353).

(1) At Trial

The circumstances of the denial of counsel at trial are summarized earlier in the brief (see pp. 27-28, above).

An assistant public defender represented petitioner at the preliminary hearing (Tr., Preliminary Hearing, p. 2). About three weeks later, the public defender appeared for petitioner at arraignment (Tr. 3), and thereafter made four successive appearances for petitioner on different matters relating to the case (Tr. 7, 9, 10, 13). In each instance, including the preliminary hearing, petitioner was present in court, to hear what was said (Tr., Preliminary Hearing, p. 4; Clerk's Transcript on Appeal, pp. 4-8).

On the arraignment, the public defender moved for a separate trial on each of the three counts (Tr. 5-6). He did not argue the matter, but asked the judge to take it under submission (Tr. 6). A week later, at a separate hearing, the prosecutor opposed the motion (Tr. 7). The defender, as his sole argument, said the "pleading [i.e., the information] is very defective, and there is no allegation of proper joinder in this matter" (Tr. 7). After a brief response from the prosecutor, the motion was denied (Tr. 7).

Additional time passed. In early July, at a hearing to set a trial date, the public defender allowed petitioner to make his own motion for separate trials (Tr. 10). The motion, somewhat inarticulate, was based on constitutional grounds—namely, that a single trial on the similar offenses would deprive petitioner of a fair and impartial hearing (A. 10-11). The defender informed the court that a motion for separate trials had already been denied, and that petitioner was in effect urging the same motion, but on different grounds (Tr. 11-12). "He wants three trials," he

said, "which is reasonable" (Tr. 12). Without hearing anything from the prosecutor, the court summarily denied the motion (A. 12).

About a week later, on the fourth appearance by the defender, petitioner asked the court to "rule on the constitutionality of this similar offense law" (Tr. 14). Instead of helping petitioner, the public defender told the court he did not know "what he [petitioner] is talking about now" (Tr. 14), and stated, in response to a question by the court, that the point "as to joining the three counts in the information" had been ruled upon (Tr. 14). The court, in any event, said that petitioner was talking about the three counts, and being tried on the three at one time (Tr. 14). After a brief colloquy, the motion was again denied (A. 14). When this happened, petitioner then asked the court appoint counsel other than the public defender (Tr. 15).

Petitioner advised the court that he wanted other counsel because, among other things, the records showed that the public defender had lost an unduly large number of cases in which the district attorney's office had been involved, and said that in his opinion, it appeared that the public defender's office did not have an organization that was a match for the district attorney's office (Tr. 15-16).

The judge said to petitioner that the public defender's office was very able, and that in asserting that the public defender had lost an unduly large number of cases, petitioner was "sort of overlooking the facts of the case" (Tr. 16). The judge went on to say that he had not "noticed any convictions that the District Attorney has been getting that doesn't seem warranted by the facts" (Tr. 16).

At this point, petitioner advised the court that if counsel other than the public defender were not appointed, he

would prefer to represent himself (Tr. 16). However, he advised the court that he was not waiving counsel (Tr. 16-17). After hearing this, and also that petitioner had no money to employ outside counsel, the court advised petitioner that he could relieve the public defender, but that in such case, the court would direct the public defender to have a member of his office present to sit in court and offer such advice and assistance as petitioner might seek (Tr. 17).

The public defender objected to the court's order to have a member of his staff sit in court, during trial. He made the following comments to the judge:

"Mr. Pulich [the public defender]: May I be heard on the matter?

"The Court: Make it brief, because one member of your office is going to be here.

"Mr. Pulich: Well, your Honor, as the Court is aware, People versus Matson specifically covers this subject.

"And I feel if the defendant wants to represent himself that practical advantage that he will have in being the poor little boy picked on by the nasty District Attorney is being completely dispelled when counsel is seated alongside him.

"Now, he looks like a wise guy who is trying to take advantage of something. I believe this mixed marriage won't work. Either we should be in with all the responsibilities of the case, or we should be out and he go forth alone.

"I am sure that Mr. Banks, from his thorough reading of the Supreme Court cases which he assures me he has done and has quoted them to me, is sufficiently

aware of the fact that when he chooses to represent himself the Court will hold him by the same standards as other counsel and the same limitations.

"And if he happens to fail to remember one of those legal points that he had read, it is going to bounce on him" (emphasis added) (Tr. 17-18).

The court, despite this argument, said that if the matter were a misdemeanor he would be inclined to go along with the public defender, but that since petitioner was charged with two counts of robbery, three prior convictions, and also attempted robbery, petitioner should have counsel available to be used by him, if he so desired (Tr. 18-19). The court then granted petitioner's motion that the public defender be relieved as counsel, and granted petitioner's request to stand in *pro per* (Tr. 19). It ordered the public defender, once more, to make available a member of his staff (Tr. 19).

Nine days later, petitioner's case was called for trial before another judge (Tr. 29). An assistant public defender was present (Tr. 29). Petitioner renewed his motion for counsel other than a public defender (Tr. 30, 34). He told the judge that he did not believe the public defender was qualified (Tr. 32-33); he said, among other things, that if he had other counsel, he believed he would have a "fair break" (Tr. 33), and that a private lawyer would work harder to present a defense (Tr. 34).

The judge, after stating that he did not think anyone could properly defend himself, in *pro per,* went on to say that he could not appoint outside counsel in lieu of the public defender (Tr. 36-39). Hearing this, petitioner said that he would prefer to represent himself, rather than accept

the public defender (Tr. 39). He said that he disagreed with the court's opinion that the public defender's office was efficient and competent (Tr. 40).

The judge then conducted a brief hearing into petitioner's background. It was discovered that petitioner had only a sixth grade education, that he had spent nearly 22 years in prison, and that he was on parole, that he had been hospitalized for psychiatric treatment while in prison, that he was working in a nearby town as a plumber, and that he was emotionally upset about the charges, because he said he was not guilty (Tr. 42-44).

Despite these facts, however, the judge concluded that petitioner would be able to defend himself and ordered him to choose between the public defender or no counsel at all (Tr. 45-47).

The judge then advised petitioner that he would have a right to appeal, whether he was represented by an attorney or not (A. 25). Petitioner said he understood, and added the comment that "it looks much better going up without counsel" (A. 25). By this he meant, as he explained in his next sentence, that he believed it was possible to appoint counsel other than the public defender's office (A. 25).

The record does not show whether this second judge, at the time he ruled on the request for counsel, knew of the accusations made by the public defender before the first judge (see pp. 99-100, above).

In any event, the second judge then advised petitioner that if he represented himself, the mere fact that he was proceeding in *pro per* would not entitle him to "privileges or indulgences accorded to attorneys or * * * to defendants who are represented by counsel" (Tr. 48). After

this, petitioner asked for a "change of venue" back to the first judge (Tr. 49), on the ground that he was more familiar with the case and with all the motions that had been made beforehand (Tr. 49). The motion was granted.

Five days later, petitioner came to trial before the first judge (Tr. 52).

The judge, before trial, told petitioner that if he wanted to have the public defender reappointed, that could be done (Tr. 53). But petitioner would not accept the public defender. He said that he believed he had a right to have counsel other than the public defender, and that he was not asking the court to appoint any specific attorney, just someone other than the defender (Tr. 53-54). The same assistant public defender who was present with petitioner before the other judge, was present this time also (Tr. 29, 52). He did not, however, mention to the court anything about petitioner's background.

When the court again denied the request for counsel, petitioner stated that he did not want to have the public defender participate in the case at all (informally or otherwise) (Tr. 54). While the reason for petitioner's statement is not entirely clear from the record, it would appear that he was concerned that if anyone from the public defender's office were present in court, his right to counsel might somehow be deemed waived or diluted (Tr. 55-56). He repeated, though, his belief that he was entitled to counsel he believed competent (Tr. 55).

The court denied petitioner's request to exclude the public defender, and ordered the assistant defender to sit in court, just inside the rail, about eight or nine feet behind the counsel table (Tr. 56, 59). He told the defender, how-

ever, that he could not speak during trial, or raise any objections (Tr. 60).

Petitioner then went to trial in *pro per*. He was under a substantial handicap throughout the proceedings, since he was in jail and was unable to contact an expert witness that he wanted (see p. 27, above), or see to it that his subpoenas were served (see p. 44, above).

From the outset, the prosecutor took advantage of petitioner: first, by calling a police inspector to identify (but not introduce in evidence) a series of documents which implied to the jury that the State had an open and shut case (see pp. 29-30, above); second, by introducing in evidence a diagram of the streets in West Oakland, not drawn to scale, in circumstances where he knew petitioner was in jail and would be unable to verify the accuracy of this diagram (see pp. 30-31, above); third, by permitting at least one of his witnesses (Griffith) to answer all of petitioner's questions concerning the robbery in the second person, rather than in the third person as called for in the questions (A. 164-177); and finally, among other things, by allowing the trial judge to give instructions not supported by the evidence on armed robbery and robbery by torture, and further instructions not supported by the record to the effect that evidence had been offered to show that defendant had committed a crime other than the ones for which he was on trial, but which could be considered by the jury in reaching a verdict (A. 308, 310).

On appeal, it was held that petitioner had waived counsel, by insisting on going to trial with someone other than the public defender (A. 318-319).

Whatever may have been the actual qualifications of the public defender's office, petitioner was entitled to rep-

resentation by an attorney in whom he had confidence. His liberty was at stake. He, more than the public defender or anyone else, stood to lose if a conviction were obtained.

The public defender had been less than vigorous in arguing for separate trials on each count (Tr. 7-8, 10-12). Further, the defender had deprecated petitioner's final request for reconsideration of the motion for separate trials, by telling the judge he did not know what petitioner was talking about (Tr. 14). Yet this motion went to the heart of the case, because it would have eliminated the attempt to link petitioner to all three offenses through the *modus operandi* argument (A. 270, 298).

Moreover, petitioner's request for outside counsel was timely, and was not impossible of fulfillment, since he had not asked for any specific attorney, but only for other counsel as the court might select.

No one with sufficient funds to hire an attorney would intrust his fate to counsel in whom he had no confidence. An accused, because he is an indigent, should not be placed in any different position (cf. *Gideon* v. *Wainwright* (1963) 372 U.S. 335, 344). Once the court is satisfied there is a genuine lack of confidence, as here, then if the right to counsel means anything at all, substitute counsel must be appointed. Otherwise, the appointment of counsel to represent an accused becomes a mere observance of form, rather than a meaningful guarantee of the right to a fair trial (cf. *Avery* v. *Alabama* (1940) 308 U.S. 444, 446; *Brubaker* v. *Dickson* (9 Cir. 1962) 310 F.2d 30, 37, certiorari denied (1963) 372 U.S. 978).

Wholly apart from the right of petitioner to request outside counsel, because of lack of confidence in the public defender, the trial court had no alternative but to ap-

point new counsel once the public defender, in his presence, had called petitioner a "wise guy" and displayed hostility (see pp. 99-100, above).

To insist thereafter that petitioner accept the public defender, or go without counsel, was, in effect, to compel a waiver. For if nothing else, petitioner had a right to undivided loyalty of counsel (see *MacKenna* v. *Ellis* (5 Cir. 1960) 280 F.2d 592, 599, opinion modified (as to procedure on remand) (1961) 289 F.2d 928, certiorari denied (1961) 368 U.S. 877). Once the public defender made his comments to the judge, in open court, petitioner had every right to doubt that such loyalty would be forthcoming. He should not have been compelled to speculate that the public defender might somehow overcome his initial animosity and go on to provide effective assistance at trial.

No individual, who was paying for an attorney, would long tolerate being called a "wise guy" in front of a trial judge, whatever the provocation might have been. The Sixth Amendment should not command that an indigent tolerate such conduct either.

In the circumstances of this case, petitioner was effectively denied his right to counsel when the court refused to appoint someone else, other than the public defender. It is no justification now to say, as the trial judge did after petitioner had been convicted on all three counts, that petitioner had conducted his defense "about as good" as the average young attorney in his first few trials out of law school (Tr. 637) (cf. *MacKenna* v. *Ellis* (5 Cir. 1960) 280 F.2d 592, 599-600, opinion modified (as to procedure on remand) (1961) 289 F.2d 928, certiorari denied (1961) 368 U.S. 877; *Townsend* v. *Bomar* (6 Cir. 1965) 351 F.2d 499; *Mosley* v. *Dutton* (5 Cir. 1966) 367 F.2d 913, certiorari denied (1967) 387 U.S. 942).

As disclosed by the record, the denial of petitioner's request for counsel led to unfairness in the proceedings which cannot now be remedied without a new trial. The convictions below, therefore, should be reversed and the case remanded for a new trial (see *Gideon* v. *Wainwright* (1963) 372 U.S. 335).

(2) On Appeal

The circumstances of the denial of counsel on appeal are summarized earlier in the brief (see pp. 57-58, above).

Apart from the refusal of the trial court to appoint counsel at that stage of the proceedings, the Court of Appeal erred when it refused to appoint counsel to brief or argue petitioner's case on the first and second remands from this Court. Although counsel originally had been appointed to represent petitioner on the appeal, that attorney had indicated by his actions that he was not particularly interested in taking timely efforts on behalf of petitioner, or otherwise pressing forward petitioner's case with vigor (see p. 57, above; see also A. 316).

The record does not indicate whether petitioner ever sent to the clerk of the Court of Appeal the letter he received from his attorney, withdrawing from the case (A. 323). But even if the Court of Appeal did not see that letter, it was apparent by the time of the decision on the first remand that counsel had not appeared or presented argument, or a brief, on behalf of petitioner. Further, when petitioner then sought certiorari to review the decision, he listed as one of his issues the fact that he had been denied the assistance of counsel on appeal (Petition for a Writ of Certiorari, O.T. 1966, No. 889 Misc., pp. 6-7). At this stage, it was clearly known to the Attorney Gen-

eral's office, if no one else, that petitioner was asserting a right to counsel and that he had not been represented on the first remand.

When the case was remanded the second time, fairness to petitioner required that the Attorney General take steps to see that the Court of Appeal was informed of the withdrawal of counsel, and new counsel appointed. In any event, once the case had been remanded a second time, it was error for the court to persist in its refusal to appoint counsel to brief or argue the case. This refusal was magnified by the denial to petitioner of any right to present oral argument on his own behalf.

The required inquiry in a *Chapman*-type remand, on a harmless error issue, is basically a factual issue. As should be obvious from the brief filed herein, if from nothing else, the record in this case was far from simple. There were three separate crimes charged to petitioner; there were 16 witnesses who testified; there were 31 exhibits introduced in evidence or marked for identification.

Further, during the first remand, when petitioner was not represented by counsel, the district attorney removed the trial exhibits from the records of the Superior Court and eventually destroyed the most crucial ones, namely, the clothing worn by petitioner at the time of his arrest, and the diagram used to locate the stores for the jury (see pp. 30-31, 38-39, above; see also A. 270). Had counsel been appointed to represent petitioner on the second remand, his first step would have been to bring such destruction to the attention of the court. These trial exhibits, as the others, were crucial to any determination whether the *Griffin* error was harmless beyond a reasonable doubt. But this matter was never brought before the court.

Under the circumstances, petitioner was denied a meaningful hearing on the two remands when the court refused to appoint counsel (*Douglas* v. *California* (1963) 372 U.S. 353; *Anders* v. *California* (1967) 386 U.S. 738). Nothing prevented the Court of Appeal from appointing counsel. All it took was an order. Merely maintaining an appearance of counsel, by keeping an attorney's name on the docket sheet as counsel of record, did not provide petitioner with the effective assistance to which he was entitled in the court below.

Finally, the right to counsel on appeal will not become moot even should the decision below be reversed on some other ground, since counsel may still be necessary on remand if there are to be further proceedings in the Court of Appeal.

Conclusion

For the above reasons, the judgment below should be reversed, and this Court should remand to the District Court of Appeal, with the instructions that on any new trial of petitioner, all identification testimony from witnesses who participated at the line-up, at the show-up, or who were shown photographs before trial be excluded from evidence.

Respectfully submitted,

THOMAS J. KLITGAARD
Attorney for Petitioner

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